BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18F-0866E

DELTA-MONTROSE ELECTRIC ASSOCIATION,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENTS.

.

ORDER TO SATISFY OR ANSWER

YOU ARE NOTIFIED THAT A FORMAL COMPLAINT HAS BEEN FILED AGAINST YOU IN THE ABOVE ENTITLED AND CAPTIONED CASE. YOU ARE ORDERED TO SATISFY THE MATTERS IN THE COMPLAINT OR TO ANSWER THE COMPLAINT IN WRITING WITHIN 20 DAYS FROM SERVICE UPON YOU OF THIS ORDER AND COPY OF THE ATTACHED COMPLAINT.

IF THE COMPLAINT IS SATISFIED AND ADEQUATE EVIDENCE OF SATISFACTION IS PRESENTED TO THE COMMISSION, THE COMPLAINT SHALL BE DISMISSED. IF THE COMPLAINT IS NOT SATISFIED, OR IF ADEQUATE EVIDENCE OF ITS SATISFACTION IS NOT PRESENTED TO THE COMMISSION, OR IF NO ANSWER IS FILED WITHIN THE TIME REQUIRED, THE ALLEGATIONS OF THE COMPLAINT MAY BE DEEMED ADMITTED, AND THE COMMISSION MAY GRANT SO MUCH OF THE RELEIF SOUGHT IN THE COMPLAINT AS IS WITHIN ITS POWER AND JURISDICTION OR MAY SET THE COMPLAINT FOR HEARING.

BY ORDER OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

WITNESS MY HAND AND THE SEAL OF THE PUBLIC UTILITIES COMMISSION of THE STATE OF COLORADO AT DENVER, COLORADO THIS DECEMBER 10, 2018.

(S E A L)

Doug Dean,
Director

ATTEST: A TRUE COPY

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18F-0866E

DELTA-MONTROSE ELECTRIC ASSOCIATION,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENTS.

ORDER SETTING HEARING AND NOTICE OF HEARING

TO THE PARTIES IN THIS MATTER:

The Colorado Public Utilities Commission orders that the hearing in this matter is set before an Administrative Law Judge on:

DATE: February 19, 2019

TIME: 9:00 AM

PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

At the above date, time and place you will be given the opportunity to be heard if you so desire.

(S E A L)

ATTEST: A TRUE COPY

DOUG DEAN, Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DOUG DEAN, Director
Colorado Public Utilities Commission
1560 Broadway, Suite 250, Denver, Colorado 80202

Dated at Denver, Colorado this
10th day of December, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * * * *

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
	)	
COMPLAINANT,	)	
	)	
V.	)	**PROCEEDING NO. 18F-____E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

FORMAL COMPLAINT

Pursuant to § 40-6-108(1), C.R.S., and 4 CCR 723-1-1302, Delta-Montrose Electric Association (DMEA), on behalf of itself and the retail customers who are its member-owners, files this Formal Complaint (Complaint) with the Colorado Public Utilities Commission (Commission). In support of its Complaint, DMEA states as follows:

NATURE OF THE PROCEEDING

1. The Complaint relates to the exit charge Tri-State Generation and Transmission Association, Inc. (Tri-State), demands from DMEA before DMEA can withdraw from membership in Tri-State. While Tri-State touts 'voluntary and open' membership, it has set a punitive exit charge that is unjust, unreasonable, and discriminatory in violation of Colorado law.

INTRODUCTION

2. DMEA is a western Colorado nonprofit rural electric distribution cooperative serving approximately 28,000 member-owners in Montrose, Delta, and Gunnison counties.

DMEA's service territory encompasses counties that, while rich in natural resources, are among Colorado's economically poorest.

3. Tri-State, a public utility under Colorado law, is a nonprofit generation and transmission cooperative corporation headquartered in Westminster, Colorado. Tri-State is organized under Colorado law and provides generation and transmission services to 43 member cooperatives in Colorado, Wyoming, Nebraska, and New Mexico, including DMEA.[1]

4. As a Tri-State member, DMEA purchases services from Tri-State under a Wholesale Electric Service Contract (WESC) that runs through 2040. DMEA passes on the costs of Tri-State's services to its member-owners through retail rates.

5. DMEA, and by extension its member-owners, have wholesale power supply options available to them that are significantly less expensive and environmentally cleaner than Tri-State's power supply. Through its Board of Directors, DMEA has a fiduciary responsibility to consider and pursue these alternative power supply options so as to stabilize and control its member-owners' retail rates.

6. For more than a decade, DMEA has pressed Tri-State to stabilize its electric rates and to let DMEA develop more local, cost-effective renewable resources. Tri-State has been unreceptive to these efforts, limiting DMEA's development of local renewable generation, and the average price paid by Tri-State's member cooperatives has increased by 56 percent since 2005.

7. DMEA and other rural cooperatives have watched as other Colorado utilities—including those serving urban areas—take advantage of declining wholesale costs to move to

[1] Approximately sixty-five percent of Tri-State's member sales are to Colorado members. *See* Tri-State Generation and Transmission Ass'n, Inc., Powering Potential: 2018 Investor Presentation, at 5, *available at* https://www.tristategt.org/sites/ts/files/PDF/2018-SECfilings/InvestorPresentation-070318.pdf.

cheaper and cleaner power sources.[2] Meanwhile DMEA member-owners have paid Tri-State's increases through their electric bills, with those increases in turn inhibiting economic development and growth in the rural economy.

8. Tri-State publicly emphasizes that its first "core principle" as a cooperative is "voluntary and open membership,"[3] and says member cooperatives can withdraw from Tri-State.

9. In 2016, a New Mexico-based Tri-State member, Kit Carson Electric Cooperative (Kit Carson), withdrew from Tri-State after paying a $37 million exit charge.[4] Tri-State publicly endorsed that exit charge as "fair" and sufficient to "protect[] the interests of all [Tri-State's remaining] members."[5]

10. Like Kit Carson, DMEA seeks to pay an exit charge that will satisfy its obligations related to Tri-State's debts and resources acquired on DMEA's behalf, while at the same time potentially allowing DMEA to migrate to a cleaner generation mix and stabilize its customers' retail rates.

11. Recognizing the critical importance of these goals for its member-owners and lacking confidence in Tri-State's ability to close the gap between its wholesale rates and those of

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[2] For example, Public Service Company of Colorado's recent Colorado Energy Plan successfully brought forward over 2,000 MW of renewable and battery storage resources with projected customer savings of more than $200 million on a present value basis.

[3] *See* Tri-State Generation and Transmission Ass'n, Inc., Powering Potential: 2018 Investor Presentation, at 4, *available at* https://www.tristategt.org/sites/ts/files/PDF/2018-SECfilings/InvestorPresentation-070318.pdf. Tri-State also touts "democratic member control" as one of its core principles. *Id.* Tri-State is governed by its Board of Directors. Each of Tri-State's 43 member cooperatives elects an individual from its own Board of Directors to serve on the Tri-State Board. These individuals are often referred to as "dual directors" since they serve both on the member Board and the Tri-State Board. Tri-State characterizes this as "democratic" governance, claiming that each member system is represented at Tri-State by its dual director: one system, one vote. The reality, however, is that these dual directors are required to represent Tri-State's interest when sitting on the Tri-State Board, as Tri-State makes clear in regular fiduciary duty presentations to its Board. *See, e.g.*, Attachment A (excerpt from Tri-State fiduciary duty 2013 presentation to Board).

[4] *See* J.R. Logan, *Kit Carson CEO Reyes says Tri-State break has two big advantages*, The Taos News (June 30, 2016), *available at* https://www.taosnews.com/stories/kit-carson-ceo-reyes-says-tri-state-break-has-two-big-advantages,23584 (also provided as Attachment B).

[5] Press Release, Tri-State Generation and Transmission Ass'n, Inc., *Tri-State and Kit Carson Electric Cooperative enter into membership withdrawal agreement* (June 27, 2016), available at https://www.tristategt.org/content/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement%C2%A0 (also provided as Attachment C).

the broader market, DMEA sought to withdraw from Tri-State and requested an exit charge in November 2016.

12. In response, Tri-State calculated a dramatically high exit charge and has declined to meaningfully vary from that calculation in the intervening years.[6] Tri-State also refuses to share key information with DMEA or other Tri-State member cooperatives—*i.e.*, the entities who own Tri-State—that would let them adequately understand how Tri-State derived its exit charge inputs. Tri-State similarly refuses to provide meaningful information as to how it calculated the Kit Carson exit charge.

13. Nevertheless, the unreasonableness of Tri-State's exit charge for DMEA is apparent even without this key information. For example, Tri-State's exit charge lacks any discernible connection to DMEA's share of Tri-State's roughly $3.8 billion in total liabilities, including $3.089 billion in outstanding long-term debt as of September 2018. Indeed, if DMEA's exit charge were proportioned out to all Tri-State cooperatives, the collective exit charges would exceed Tri-State's liabilities by *billions of dollars*, with Tri-State also retaining all of its operating assets. A multibillion-dollar Tri-State windfall is the hallmark of neither a just nor reasonable exit charge, particularly given Tri-State's status as a nonprofit entity operated to benefit its member cooperatives.

14. Moreover, DMEA's exit charge is vastly disproportionate to Kit Carson's $37 million charge, notwithstanding several key similarities between them, including (1) Kit Carson's exit occurred only months before Tri-State calculated DMEA's exit charge; (2) Tri-

[6] Tri-State claims the exit charge calculation for DMEA is confidential despite multiple disclosures by Tri-State. DMEA believes its exit charge calculation is no longer confidential but will treat it as such until the Commission can consider the issue. Accordingly, any attachments to this Complaint that include this exit charge figure have been provided with that figure redacted, pending further discussion of this issue with Tri-State, and consideration of this issue by the Commission, if necessary.

State claimed to apply the same calculation methodology to the respective exit charges; and (3) Kit Carson had the same WESC as DMEA, with the same 2040 term.

15. Like Kit Carson, DMEA seeks a just, reasonable, and nondiscriminatory exit charge from Tri-State. But Tri-State's disparate Kit Carson and DMEA exit charges—even when accounting for differences between the cooperatives—reflect discriminatory, abusive, and unjust and unreasonable treatment against DMEA that Colorado public utilities law exists to remedy. DMEA is willing to pay an exit charge fair to Tri-State's remaining members, but cannot ask its own member-owners to pay an exorbitant exit charge. DMEA has a utility obligation to respond to charges that are unjust, unreasonable, and discriminatory.

16. DMEA participated in a lengthy internal Tri-State dispute and appeal process (called Board Policy 316) without obtaining a just, reasonable, and nondiscriminatory exit charge. During the Board Policy 316 process, Tri-State maintained its high exit charge and refused to give DMEA information that would let it meaningfully evaluate either the DMEA or Kit Carson exit calculations. Tri-State also asserted it can set an exit charge "in its sole discretion," notwithstanding whether the charge is just or reasonable under Articles 1–7 of Title 40, C.R.S. (Public Utilities Law).

17. Tri-State's "core principle" of "voluntary and open membership," reflected in the withdrawal provisions of the Tri-State Bylaws,[7] is hollow if Tri-State can unilaterally set an exit charge that is unjust, unreasonable, and discriminatory. In essence, Tri-State maintains it has the right to deprive rural Coloradans of less expensive and cleaner generation resources, and deny them opportunities for local growth and economic development that come with that lower-cost energy supply.

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[7] Tri-State's Bylaws are provided as Attachment D.

18. Through this Complaint, DMEA requests that this Commission: (a) exercise its jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (b) investigate Tri-State's exit charge to DMEA and declare it contrary to Colorado law as unjust, unreasonable, and discriminatory; and (c) exercise its statutory authority to establish an exit charge that is just, reasonable, and nondiscriminatory.

JURISDICTION

I. General Jurisdictional Background

19. The Commission has jurisdiction to act on the allegations and claims in this Complaint under Article XXV of the Constitution of the State of Colorado and under the Public Utilities Law.[8]

20. DMEA is a public utility under § 40-1-103(2)(a), C.R.S., and has opted through a vote of its member-owners to exempt itself from Commission regulation under the Public Utilities Law.[9] Accordingly, DMEA is regulated under § 40-9.5-101, C.R.S., *et seq.* DMEA is governed by an elected Board of Directors and must provide member-owners with electric service inside its certificated service territory.

21. Like DMEA, Tri-State is also a public utility under Colorado law because it is a "cooperative electric association, or nonprofit electric corporation or association" which the law declares "to be affected with a public interest and to be a public utility and to be subject to the

[8] Article XXV states that "In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges" of a public utility "is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate. Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado."

[9] *See* §§ 40-9.5-103 and -104, C.R.S. (allowing distribution cooperatives like DMEA to elect exemption from the Public Utilities Law).

jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of [Title 40]."[10]

22. Unlike DMEA, however, Tri-State as a "nonprofit generation and transmission electric corporation[] or association[]" cannot exempt itself from public utility regulation under the Public Utilities Law.[11]

23. Colorado's Public Utilities Law gives the Commission broad jurisdiction over public utilities like Tri-State. The Commission has the power, authority, and duty "to govern and regulate all rates, charges, and tariffs of every public utility" (except those like DMEA who have exempted themselves), to "correct abuses" by public utilities, to "prevent unjust discriminations . . . in the rates, charges, and tariffs of such public utilities," to "generally supervise and regulate every public utility in this state," and "to do all things" that are "necessary or convenient in the exercise of such powers."[12]

24. The Public Utilities Law also provides that, except as expressly authorized by statute, no regulated public utility "shall make or grant any preference or advantage" or "establish or maintain any unreasonable difference as to rates [or] charges . . . ."[13]

25. In addition, the Public Utilities Law gives the Commission expansive authority to prescribe remedies in complaint proceedings such as this. Section 40-3-111(1), C.R.S., provides:

> Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, [...] or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, [...] the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter

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10 § 40-1-103(2)(a), C.R.S.; *W. Colo. Power Co. v. Pub. Utils. Comm'n*, 411 P.2d 785, 794-96 (Colo. 1966).
11 § 40-9.5-102, C.R.S.; § 40-9.5-103, C.R.S.
12 § 40-3-102, C.R.S.
13 § 40-3-106(1)(a), C.R.S.

> observed and in force and shall fix the same by order. In making this determination, the Commission may consider [...] any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.[14]

26. Similarly, § 40-3-111(2)(a), C.R.S. provides that "[t]he Commission has the power . . . upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility; and to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, practices, or schedules, in lieu thereof."[15]

27. Colorado's Public Utilities Law facially applies to Tri-State as a nonprofit generation and transmission cooperative corporation, and prevents it from "establish[ing], charg[ing], or collect[ing] a discriminatory or preferential rate, charge, rule, or regulation" in violation of § 40-3-106(1), C.R.S. or § 40-3-111, C.R.S.[16]

II. The Commission's Previous Exercise of Jurisdiction over Tri-State in Proceeding No. 13F-0145E

28. In response to a 2013 complaint filed by several other Tri-State member cooperatives, the Commission confirmed its jurisdiction over Tri-State as a public utility in Proceeding No. 13F-0145E.[17]

29. In that proceeding, three Tri-State member cooperatives (La Plata Electric Association, Inc., Empire Electric Association, Inc., and White River Electric Association) brought a complaint (Colorado Co-Op Complaint) alleging that Tri-State's all-energy (and no

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[14] § 40-3-111(1), C.R.S.

[15] § 40-3-111(2)(a), C.R.S.

[16] § 40-6-111(4)(a), C.R.S.

[17] The proceeding was captioned *La Plata Electric Association, Inc.; Empire Electric Association, Inc.; White River Electric Association, Inc.; BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Production Company as Members of the Rural Electric Consumer Alliance; and Kinder Morgan CO_2 Company, LP, v. Tri-State Generation and Transmission Association, Inc.*

demand component) A-37 rate was unlawful, unjust, unreasonable, discriminatory, and preferential. The member cooperatives maintained that the Commission had jurisdiction to act on their complaint under Article XXV of the Colorado State Constitution and the Public Utilities Law. Tri-State moved to dismiss, alleging that the Commission lacked jurisdiction to hear the complaint.[18]

30. The Administrative Law Judge (ALJ) denied Tri-State's motion to dismiss the Colorado Co-op Complaint in Decision No. R13-1119-I (Attachment E). The ALJ rejected Tri-State's arguments and made the following findings:

- Tri-State concedes that it is a public utility;
- Article XXV of the Colorado State Constitution places the primary duty and responsibility of determining just and reasonable public utility rates with the Commission. The primary purpose of utility regulation is to ensure that the rates charged by utilities are not excessive or unjustly discriminatory;
- Nonprofit generation and transmission cooperative corporations like Tri-State are subject to rate jurisdiction under the Public Utilities Law, including § 40-3-106(1), §§ 40-6-108(1)(a) and (b), and § 40-3-102, C.R.S. Reading those statutes together, nothing can be ascertained which would diminish any Commission jurisdiction under Public Utilities Law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates or charges;
- Specifically, § 40-6-111(4)(a), C.R.S., provides that the Commission shall, upon complaint filed by any member or customer of a cooperative electric association, determine whether the *rate or charge* in question is contrary to § 40-6-111, § 40-3-106(1), or § 40-3-111, C.R.S.;
- Tri-State's concerns regarding the full rate regulation it assumed would be asserted by the Commission if it did not dismiss the complaint were speculative at best; and

[18] Tri-State alleged that the Commission could not exercise jurisdiction because, among other things: (1) it would violate the U.S. Constitution's Commerce Clause; (2) section 40-2-112(1), C.R.S. provides that nonprofit generation and transmission electric associations "may be" subject to less regulation and no rate regulation; (3) there is no requirement for Tri-State to file with the Commission tariffs, contracts, or electric service agreements; (4) section 40-6-108(1)(b), C.R.S., which requires 25 customers to file a complaint, was not meant to apply to generation and transmission electric associations like Tri-State because it only has 18 Colorado member systems; and (5) entertaining the complaint would interfere with contractual obligations because each Tri-State member system has entered into a wholesale electric service contract which obligates them to pay the rates duly adopted by Tri-State's Board of Directors.

- The Commerce Clause arguments raised by Tri-State are not available to it since Congress has provided an avenue for state regulation over Tri-State's wholesale interstate rates. Given the lack of federal oversight over the wholesale rates of Tri-State,[19] the Commission must utilize its authorized jurisdiction to investigate claims that Tri-State's rates or charges are unjust, unreasonable, or discriminatory.

31. Tri-State filed a motion contesting Decision No. R13-1119-I. In Part I of Decision No. C14-0006-I, the Commission unanimously confirmed that it had jurisdiction to hear the Colorado Co-op Complaint, finding that "Colorado has important interests in the Commission performing its duties under Article XXV and the Public Utilities Law to regulate public utilities. Colorado's interests are reflected in §§ 40-3-101, 106(1), and 111(1), C.R.S., which prevent a public utility from charging unjust, unreasonable, discriminatory, or preferential rates."[20]

32. In Part II of Decision No. C14-0006-I, the Commission on a 2-1 vote[21] found that, notwithstanding its determination in Part I, it could not require Tri-State to undertake a partial or full rate case. The Commission confined its review to a defined legal issue: whether the failure to include a demand and energy charge in a utility rate violates regulatory principles. Commissioner Tarpey dissented from Part II of the decision, stating:

> [W]hile a 'full-blown' rate case may not be acceptable, there is no reason to assume that could be the only possible remedy. It may be a determination that Tri-State needs to develop within a certain amount of time a rate that is not in violation of Colorado law and policy. There may be other remedies but these will be unknown because the parties are being denied the opportunity to present any remedies.[22]

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19 Tri-State's member rates and charges are not regulated by the Federal Energy Regulatory Commission.

20 Decision No. C14-0006-I, at 20, ¶ 44, Proceeding No. 13F-0145E (mailed Jan 3, 2014) (Attachment F).

21 Chairman Epel and Commissioner Patton, with Commissioner Tarpey dissenting.

22 *Id.*, Commissioner James K. Tarpey Dissenting in Part, at 28, ¶ 6. Here, the Commission need not undertake anything like a rate case, full-blown or otherwise, to address DMEA's claims.

33. After the issuance of Decision No. C14-0006-I, the parties reached a settlement in which Tri-State agreed to modify its rates, and by Decision No. R16-0045 the ALJ approved a joint motion to withdraw the Colorado Co-op Complaint.

34. As confirmed in Proceeding No. 13F-0145E, the Commission has legal authority to act on the allegations and claims asserted in this Complaint pursuant to Article XXV of the Colorado Constitution and the Public Utilities Law. These authorities provide that the Commission must act in order to prevent a public utility from charging unjust, unreasonable, discriminatory, or preferential rates, fares, tolls, rentals, charges or classifications.[23]

GENERAL ALLEGATIONS

I. Kit Carson's 2016 Withdrawal from Tri-State

35. The equitable member withdrawal provision in Article I, Section 3 of Tri-State's Bylaws reflects Tri-State's "core principle" of "voluntary and open membership."

36. Consistent with this "core principle" and for the same reasons DMEA now seeks to exit, Kit Carson exited the Tri-State system in 2016. After having initially demanded $137 million as an exit charge,[24] Tri-State calculated a final $37 million exit charge[25] for Kit Carson's withdrawal from Tri-State.

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[23] § 40-3-111(1), C.R.S. and § 40-3-111(2)(a), C.R.S., provide the Commission with broad statutory authority and discretion to investigate and establish "a single rate, fare, toll, rental, charge, classification, rule, contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility." § 40-3-111(2), C.R.S. The Commission also has jurisdiction "to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices, or schedules, in lieu thereof." *Id.*

[24] *See supra*, fn. 4. With respect to the initial $137 million exit charge, Kit Carson's CEO stated that "Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State's costs." *See* Attachment G.

[25] This $37 million net cash consisted of $49.5 million as an early termination fee for withdrawing from membership offset by $12.5 million for the retirement of Kit Carson's patronage capital. *See* Tri-State Generation and Transmission Ass'n Inc., Quarterly Report, at 8 (Nov. 4, 2016) *available at* https://www.tristategt.org/sites/ts/files/PDF/2016-SECFilings/10Q-093016.pdf. Tri-State's summary of the exit can be found on page 64 of its 2016 10-K filed with the SEC. Tri-State Generation and Transmission Ass'n, Inc., Annual Report (Form 10-K), at 64 (Mar. 10, 2017), *available at* https://www.tristategt.org/sites/ts/files/PDF/2016-SECFilings/10K-EOY-123116.pdf.

37. Tri-State embraced the $37 million Kit Carson exit charge as just, reasonable, and nondiscriminatory for Kit Carson and for Tri-State's other member cooperatives. Tri-State publicly described it as "fair and equitable," and "protect[ing] the interests of all [Tri-State's remaining] members."[26]

II. DMEA's Efforts for a Just, Reasonable, and Nondiscriminatory Exit Charge

38. Over the past two years, DMEA has worked within the limits of the Tri-State system to obtain a just, reasonable, and nondiscriminatory exit charge. Before filing this Complaint, DMEA exhausted Tri-State's information request policy (called Board Policy 406) and Tri-State's informal and formal Board Policy 316 dispute resolution processes. In doing so, DMEA sought: (a) to understand how Kit Carson's $37 million exit charge related to the disproportionate exit charge calculation for DMEA; (b) to meaningfully understand how Tri-State determined DMEA's exit charge; and (c) to obtain a just, reasonable, and nondiscriminatory exit charge allowing its Tri-State withdrawal.[27]

39. In both the Policy 406 and Policy 316 processes, Tri-State refused to provide information DMEA had requested to reconcile DMEA's disproportionately large exit charge with that of Kit Carson. Tri-State claimed to have applied the same exit charge methodology to DMEA and Kit Carson, and did not dispute that the cooperatives shared key factors—for example, both were the only cooperatives in the Tri-State system with WESCs running through 2040. Tri-State nevertheless claimed the value to Tri-State of one member cooperative's WESC "is not relevant to the value to Tri-State of any other Member System's [WESC]."[28] Tri-State also refused to share "calculations and information about [Kit Carson's] withdrawal" with DMEA on the grounds it "will be a burdensome exercise that, at best, will only distract the

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26 *See* Attachment C.

27 DMEA's information request under Policy 406 is provided as Attachment H.

28 *See* Attachment I at 2 (May 8, 2018 Tri-State letter).

parties by focusing on a transaction that has little or no relevance to DMEA's proposed withdrawal from Tri-State."[29]

40. Tri-State's assertion that the Kit Carson exit charge is "not relevant" to the DMEA exit charge is conclusory and lacks merit. The Kit Carson exit charge, and the manner in which it was determined, is directly relevant to the question of whether Tri-State prescribed an unjust, unreasonable, and discriminatory exit charge for DMEA.

41. Through the Policy 316 dispute process DMEA also sought more information about Tri-State's calculation of DMEA's own exit charge. Tri-State refused, saying DMEA could "replicate" Tri-State's exit charge based on Tri-State "inputs."[30] Replicating an exit charge formula using inputs, however, is different from understanding *how the inputs themselves were derived.* Lacking access to Tri-State's spreadsheets and work papers, DMEA could only speculate as to how Tri-State calculated the variables yielding its substantial exit charge.

III. Tri-State is Obligated under Colorado Law to Provide Member Cooperatives a Just, Reasonable, and Nondiscriminatory Exit Charge

42. Tri-State believes it can set exit charges how it wants and without any obligation under Colorado law to provide exit charges that are just, reasonable, and nondiscriminatory.

43. During the Board Policy 316 dispute process, Tri-State argued Article I, Section 3 of the Tri-State Bylaws (which says a member cooperative can withdraw on "such equitable terms and conditions as the Board of Directors may prescribe") means Tri-State "may but need not" prescribe just and reasonable exit terms.[31]

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[29] *See* Attachment J (August 23, 2018 Tri-State Board decision denying DMEA's complaint under Board Policy 316) at 7. It should be noted that Kit Carson gave Tri-State explicit permission to share Kit Carson-related exit charge materials with DMEA.

[30] *See id.* at 5,7.

[31] *Id.* at 7.

44. In the same Policy 316 decision, Tri-State refused to give DMEA the requested exit-charge related information for itself and for Kit Carson. This continued to deprive DMEA—a member and owner of Tri-State—of the ability to evaluate the underlying assumptions and bases used to calculate the unjust and unreasonable exit charge.

45. Tri-State's position that DMEA has no right to withdraw from Tri-State and that any withdrawal is entirely within the discretion of the Board reveals the hollowness of Tri-State's "core principle" of "voluntary and open membership." It also violates Colorado law: Tri-State may not arbitrarily let some of its member cooperatives exit while essentially holding others captive through unjust, unreasonable, and discriminatory exit charges—the justifications for which are never explained.[32]

46. On September 21, 2018, DMEA appealed Tri-State's denial of DMEA's Board Policy 316 formal complaint (Attachment L). The Board Policy 316 process ended approximately two months later when Tri-State denied DMEA's appeal (Attachment M).

IV. DMEA's Request to the Commission

47. Because Tri-State is a public utility subject to Colorado's Public Utilities Law, the Commission should exercise its jurisdiction to decide both the lawfulness of Tri-State's position that it can impose unjust, unreasonable, and discriminatory exit charges, as well as the lawfulness of DMEA's exit charge.

48. If the Commission determines DMEA's exit charge is unlawful, DMEA requests the Commission, consistent with its statutory authority and mandate, adjudicate a just, reasonable, and nondiscriminatory exit charge for DMEA. Such a request does not require the

[32] In 2016, Tri-State tried to amend its Bylaws to let the Board set a member's exit charge in the Board's "sole discretion." *See* Attachment K. The proposed change was rejected. Tri-State's position in the Board Policy 316 process—that Tri-State has the power to set unjust, unreasonable, and discriminatory exit charges—contradicts the failed 2016 attempt to amend the Bylaws to provide the Tri-State Board sole discretion to prescribe an exit charge.

Commission to apply the Tri-State WESC, Tri-State's Bylaws, or any Tri-State contract with DMEA for that matter. Nor does it require changing any rate Tri-State currently charges its members; as such, a rate case—whether "full blown" or otherwise—is unnecessary.

49. DMEA will be filing a motion asking the Commission to hear this Complaint *en banc* and to establish a procedural schedule commencing in February 2019. This will allow DMEA to put forward expert testimony for a just, reasonable, and nondiscriminatory exit charge for Commission adjudication.

50. DMEA's request to the Commission is narrow. But the long-term economic and environmental benefits to DMEA's rural member-owners—and other rural citizens across the state—would be significant. Having exhausted its other options, DMEA respectfully requests that the Commission fulfill its primary mandate of protecting public utility customers by: (a) exercising jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (b) investigating Tri-State's DMEA exit charge and declaring it contrary to Colorado law as unjust, unreasonable, and discriminatory; and (c) exercising its statutory authority to establish an exit charge that is just, reasonable, and nondiscriminatory.

FIRST CLAIM
(UNJUST AND UNREASONABLE EXIT CHARGE)

51. DMEA incorporates the allegations in the paragraphs above.

52. Section 40-3-101, C.R.S., § 40-3-102, C.R.S., § 40-3-111(1), C.R.S., and § 40-3-111(2)(a), C.R.S. are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

53. Tri-State's prescribed DMEA exit charge is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

54. Tri-State's exit charge for DMEA is not just and reasonable.

55. Because the exit charge is not just and reasonable, the Commission has the authority and duty under Colorado's Public Utilities Law to determine an exit charge for DMEA that is just and reasonable.[33]

56. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as DMEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

57. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as DMEA represents more than 25 end-use customers of Tri-State.

58. DMEA has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as DMEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

SECOND CLAIM
(DISCRIMINATORY EXIT CHARGE)

59. DMEA incorporates the allegations in the paragraphs above.

60. Section 40-3-106(1), C.R.S. and § 40-3-111(4)(a), C.R.S. prohibit public utilities, including nonprofit generation and transmission corporations like Tri-State, from charging rates or establishing charges that are preferential or discriminatory.

61. Section 40-3-102, C.R.S., § 40-3-106(1)(a), C.R.S., § 40-3-111(1), C.R.S., § 40-3-111(2)(a), C.R.S., and § 40-3-111(4)(a), C.R.S., are each applicable to Tri-State as a public

[33] *See* § 40-3-111(1), C.R.S. ("Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the commission may consider any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.")

utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

62. Tri-State's DMEA exit charge is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

63. Tri-State refuses to explain how it set a $37 million exit charge for Kit Carson while demanding DMEA pay an exit charge that is dramatically and disproportionately higher.

64. Tri-State's exit charges for Kit Carson and DMEA represent an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect.

65. Because Tri-State's exit charges for Kit Carson and DMEA demonstrate an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect, the Commission has the authority and duty to determine an exit charge for DMEA that is not discriminatory pursuant to the Public Utilities Law.[34]

66. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as DMEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

67. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as DMEA represents more than 25 end-use customers of Tri-State.

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[34] *See* § 40-3-111(1), C.R.S. ("Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the commission may consider any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.")

68. DMEA has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as DMEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

SERVICE OF DOCUMENTS

DMEA requests that all testimony, discovery, pleadings, and other documents in this proceeding be served on the following:

Jasen Bronec
Chief Executive Officer
Delta-Montrose Electric Association
11925 6300 Road
Montrose, Colorado 81401
jasen.bronec@dmea.com

Raymond L. Gifford, #21853
Matthew S. Larson, #41305
Wilkinson Barker Knauer LLP
1755 Blake Street, Suite 470
Denver, Colorado 80202-3160
Telephone: (303) 626-2350
Fax: (303) 626-2351
E-mail: rgifford@wbklaw.com
mlarson@wbklaw.com

RELIEF REQUESTED

DMEA requests that the Commission provide the following relief:

(i) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the DMEA exit charge prescribed by Tri-State is unjust and unreasonable;

(ii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the DMEA exit charge prescribed by Tri-State is discriminatory;

(iii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., establishing an exit charge for DMEA that is just, reasonable, and nondiscriminatory; and

(iv) Award DMEA such additional or other relief as the Commission deems proper.

Respectfully submitted this 6th day of December, 2018.

By: */s/ Matthew S. Larson*
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mlarson@wbklaw.com

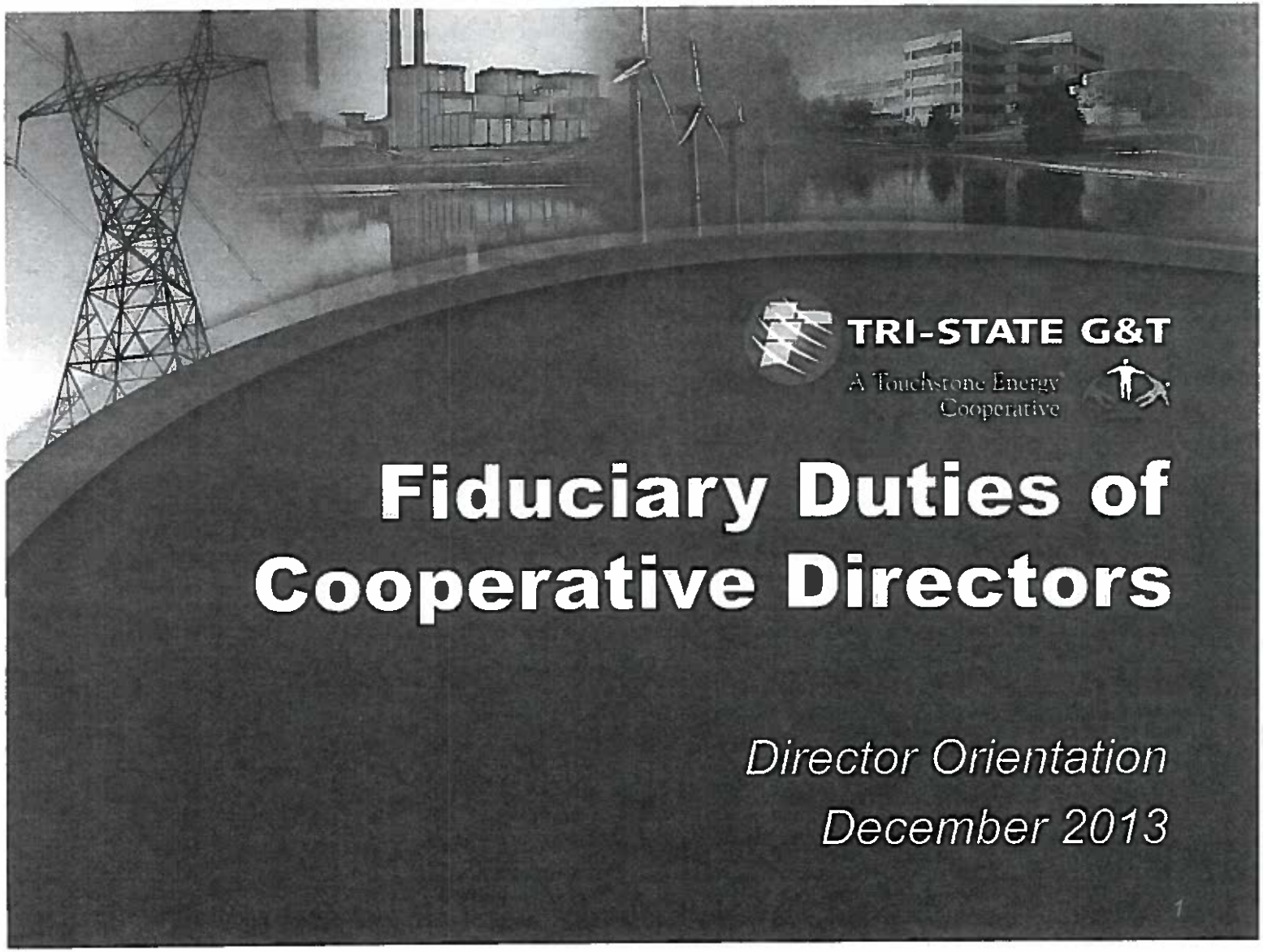
ATTORNEYS FOR DELTA-MONTROSE ELECTRIC ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2018, a copy of the foregoing **FORMAL COMPLAINT** was filed with the Colorado Public Utilities Commission via e-file and a copy was served via e-mail to the following:

Doug Dean	Doug.dean@state.co.us	Colorado Public Utilities Commission
Cindy Schonhaut	cindy.schonhaut@state.co.us	Colorado Office of Consumer Counsel
Tom Dixon	Thomas.Dixon@coag.gov	Colorado Office of Consumer Counsel
Ken Reif	kreif@tristategt.org	Tri-State Generation and Transmission Association, Inc.
Rick Gordon	Rick.gordon@tristategt.org	Tri-State Generation and Transmission Association, Inc.
Tom Dougherty	TDougherty@lrrc.com	Tri-State Generation and Transmission Association, Inc.
Jasen Bronec	jasen.bronec@dmea.com	Delta-Montrose Electric Association, Inc.
Ray Gifford	rgifford@wbklaw.com	Delta-Montrose Electric Association, Inc.
Matt Larson	mlarson@wbklaw.com	Delta-Montrose Electric Association, Inc.

/s/ Hannah Bucher
Hannah Bucher



"Dual Directors"

- When serving on the Board of a distribution cooperative, the Director's fiduciary duties are to the distribution cooperative.
- When serving on the Board of a G&T, the Director's fiduciary duties are to the G&T AND to the distribution cooperative.
- The Board of Directors of a G&T is not a representative democracy where each Director's responsibility is to represent the interests of his or her distribution cooperative.
- The G&T Director must discharge his or her fiduciary duties in the best interests of the G&T; however, the Director still owes duties to his or her distribution cooperative.
- At times, this may result in the Director taking differing positions on each Board based upon his or her good faith beliefs and the discharge of his or her fiduciary duties.
- The Dual Director must manage his or her participation on both Boards and his or her actions so as to preserve his or her ability to discharge the duties separately owed to each entity.
- A Dual Director who cannot in good faith discharge his or her fiduciary duties to both the distribution cooperative and the G&T must decide whether it is necessary to recuse himself or herself from certain Board actions or resign from one or both Boards.

Kit Carson CEO Reyes says Tri-State break has two big advantages

Kit Carson Electric Co-op

Posted Thursday, June 30, 2016 8:00 pm

J.R.Logan

Kit Carson Electric Cooperative has agreed to pay $37 million to get out of its wholesale power contract, which the co-op has blamed for holding back development of solar energy in Taos.

"In some sense, we won't have someone watching over our shoulder," co-op CEO Luis Reyes told The Taos News.

The exit from Denver-based Tri-State Generation and Transmission is expected to become official June 30.

The co-op plans to buy electricity from a Florida-based power marketer for at least the next 10 years.

Kit Carson and Tri-State have been at odds for years over a number of controversial issues. Perhaps most notably, a provision in a power supply contract — one that does not expire until 2040 — limited the amount of renewable electricity the co-op could generate on its own to 5 percent. The co-op is up against that ceiling and has complained that the limit has stifled the development of solar power production in Northern New Mexico.

Tri-State has said the provision was necessary to ensure it sold an adequate amount of electricity.

The co-op has also complained that Tri-State had regularly imposed "arbitrary" rate increases and had been unwilling to subject itself to regulation. Tri-State again countered that it was beyond the jurisdiction of state regulators. The issue led to a lawsuit in federal court.

The withdrawal agreement since June 21 appears to resolve those and other conflicts with a clean break that both sides are calling amicable.

"I don't think they're happy to see us go," Reyes told The Taos News. "It does show that something wasn't right and we weren't able to fix it. I do think for [Kit Carson and Tri-State], it was in our bests interest to have this departure."

Reyes said leaving Tri-State had two clear advantages: certainty on the price of power and freedom to expand locally generated renewable energy.

The same day the exit was announced, Kit Carson said it had signed a long-term power purchase agreement with Florida-based Guzman Renewable Energy Partners. Under the 10-year Guzman contract, Reyes said the co-op knows exactly what the price of power will be through 2026. Until the deal closes, Reyes said he could not reveal those prices.

As for renewables, Reyes said more flexibility doesn't necessarily mean members should expect solar arrays to start popping up across the co-op service territory overnight.

"Our intent is to get more solar on the system, but do it smartly and over a period of time," he said.

The $37 million question

In a June 27 filing with the U.S. Securities and Exchange Commission, Tri-State said Kit Carson had agreed to make a "net cash payment" of $37 million before the deal closed.

Reyes said he could not reveal the source of the money until the payment was complete.

He did say where the money would not come from. "We're not borrowing. There won't be any loan. And it will not show up on our balance sheet," Reyes said.

The payment of tens of million of dollars has already raised concerns from some co-op members, including those currently protesting Kit Carson's proposed rate increase.

Reyes did say he was satisfied that the co-op managed to talk Tri-State down significantly from its opening offer. "In the context of where we were at, we did a pretty good job," Reyes said, noting that $37 million to get out was a "fair" result that would ensure Kit Carson's departure wouldn't cause electric rates to go up for the 43 co-ops that still rely on Tri-State.

Lee Boughey, a spokesman for Tri-State, declined to go into detail about how it calculated the $37 million figure.

In 2015, Tri-State reported net margins of $53.4 million. That year, Kit Carson bought $21 million worth of power from Tri-State, accounting for 1.62 percent of Tri-State's total sales.

It's hard to know exactly how much of a profit Kit Carson generated for Tri-State and what Kit Carson's financial contribution would have been through the end of its contract.

Tri-State's net margins were 4.1 percent of its annual operating revenue in 2015. At that rate, Tri-State would have made about $867,700 by providing electricity to Kit Carson in 2015.

Multiplied over the remainder of the contract term, Tri-State would have made $20.8 million in profit from Kit Carson between now and 2040, though that figure does not take into account many variables (like the notoriously volatile price of electricity) and is far from exact.

Kit Carson was awarded $958,000 in "capital credits" for 2015, which are theoretically the co-op's share of Tri-State's margins. Through 2040, that would add up to around $23 million.

The $37 million buyout price comes out to $1.54 million to Tri-State for every year remaining in the contract.

Peter Adang, who sat on the Kit Carson board until a few months ago, wrote on an online blog in November 2015 that said Tri-State was originally demanding a $132 million exit fee, or about $5.25 million for every year remaining on the contract.

Neither Reyes nor Boughey would confirm that number, citing non-disclosure agreements.

In the same blog post, Adang also hinted at ways the co-op might be able to buy out of its Tri-State contract. Adang wrote that the co-op could "roll" the exit fee into the price it pays for power, meaning its power supplier could pay the $37 million upfront and the co-op would pay it back through a surcharge on the price of electricity.

Based on 2015 demand, co-op members would have to pay an extra 1.27 cents per kilowatt hour to pay back $37 million in 10 years with no interest.

Cost of power

A news release announcing the Kit Carson/Guzman power contract called the deal "a significant step in giving members greater flexibility at a lower cost."

Corporate records show Guzman Renewable Energy Partners was incorporated in June 2015. The company is affiliated with Guzman Energy LLC, which was launched by the investment bank and brokerage firm Guzman & Co. in 2014.

The release said the new contract would save Kit Carson customers "in excess of $50 million" over the next decade. Reyes said that figure was based on a lower cost for electricity.

According to its 2015 annual report, the co-op's average cost of power from Tri-State was 7.26 cents per kilowatt hour. If the co-op expects to save $50 million over the next 10 years and the price of energy remained constant, the co-op's cost per kilowatt hour would have to drop to 5.54 cents per kilowatt hour.

On May 13, Guzman Renewable Energy Partners got "market-based rate authorization" from federal regulators, meaning the company could wholesale electricity outside the traditional "cost-based" rates.

Instead of asking regulators for an increase when their costs go up, Guzman and Kit Carson agreed on specific prices ahead of time.

Chris Riley, president of Guzman Energy, told The Taos News his company can offer cheaper electricity because it has much less overhead compared to a generation and transmission behemoth like Tri-State.

"This is what we do. This is what we launched the business for," Riley said. "For Kit Carson, they wanted more flexibility, and we were able to come in and provide that for them."

This is not Guzman's first foray into New Mexico. In January, Guzman Energy announced it would be the primary power provider to the city of Aztec.

The Taos News obtained a copy of the power sales agreement between Guzman and Aztec from the city government under a request for public records this week.

The contract shows Guzman would sell electricity to the city for 4.950 cents per kilowatt hour. As part of the deal, the company agreed to build a $2 million solar facility that is expected to generate 8 percent of the city's total power supply.

The contract stipulates that Guzman is not required to buy renewable energy instead of fossil fuels when purchasing electricity for the city.

Riley would not disclose if there are any such requirements in the Kit Carson contract, but he did say the co-op would meet mandatory renewable benchmarks set by state law.

A game changer

During its lengthy dispute with Tri-State, Kit Carson sometimes framed the fight as a "David-versus-Goliath" battle over green energy, pointing to Tri-State's heavy investment in coal-fired power.

In fact, many of the cooperatives served by Tri-State are in heavily coal-reliant areas of Wyoming and Colorado, where the transition to natural gas production and some renewables has already had a devastating impact to local economies.

But Boughey insisted Tri-State has been "very bullish on renewables" and has "very progressive renewable energy policies." The irreconcilable breakdown with Kit Carson had more to do with the terms of the contract, Boughey said.

Leaving Tri-State will likely mean Kit Carson has more room to expand its solar portfolio, but other cooperatives have recently found ways to lean more on locally generated renewable power without a full-scale exit.

Delta-Montrose Electric Cooperative in western Colorado recently won approval from federal regulators to buy hydroelectric power from a third-party generator. Tri-State opposed that deal, saying it violated the 5 percent cap.

Regulators ruled June 16 that Delta-Montrose did not have to pay an extra surcharge if it bought electricity from that provider instead of Tri-State.

Virginia Harman, vice president of member relations and human resources for Delta-Montrose, told The Taos News her co-op was excited about the ruling and the economic opportunities that might come from expanding local renewable generation.

She declined to comment on whether Delta-Montrose intended to follow Kit Carson's lead and leave Tri-State.

Tri-State was not concerned that Kit Carson's exit would set a precedent. "We haven't received any requests from any other members about withdrawing from the association," Boughey said.

For solar proponent Bob Bresnahan — a board member with Renewable Taos and newly elected member of the Kit Carson board — walking away from Tri-State is a game changer.

In an interview, he called the contractual limit on local generation "the principal obstacle to expanding renewable energy in our community."

Bresnahan acknowledged that the Delta-Montrose example could apply to Kit Carson, but he also noted that Tri-State would have fought tooth and nail against every project proposal, delaying progress and costing a fortune in legal fees.

With Tri-State out of the way, Bresnahan hoped Northern New Mexico might suddenly be more attractive to developers who want to erect arrays to sell to Kit Carson and beyond.

"We're on this ride now, and it's an opportunity for our community to really lead," Bresnahan said.

TRI-STATE
Generation and Transmission Association, Inc.
A Touchstone Energy® Cooperative

Tri-State and Kit Carson Electric Cooperative enter into membership withdrawal agreement

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Tri-State Generation and Transmission Association, Inc. ("Tri-State") and Kit Carson Electric Cooperative, Inc. ("KCEC") have entered into a membership withdrawal agreement.

The agreement, which was signed by Tri-State and KCEC on June 21, 2016, is subject to KCEC's receipt of certain approvals and provides for the termination of the wholesale electric service contract between Tri-State and KCEC and the withdrawal of KCEC from membership in Tri-State effective as of the closing date.

"We have reached a mutual and amicable agreement to part ways," said Tri-State Chief Executive Officer Mike McInnes. "The agreement is fair and equitable, and protects the interests of all the association's members."

"This separation serves both our cooperatives well, allowing us to move forward to best serve our respective members' needs and wants," said KCEC Chief Executive Officer and General Manager Luis Reyes.

The parties anticipate that the closing date will be on or about June 30, 2016.

Additionally, Tri-State and KCEC will sell to each other certain transmission and distribution infrastructure facilities and enter into operations agreements for jointly owned or collocated infrastructure.

KCEC became a member of Tri-State following the association's merger in 2000 with Plains Electric Generation and Transmission Cooperative of Albuquerque, N.M., which added 12 New Mexico cooperatives to Tri-State's member distribution system network.

Kit Carson Electric Cooperative is a member-owned electric distribution cooperative that serves more than 29,497 members in Taos, Colfax and Rio Arriba counties in New Mexico.

Updated: June 27, 2016

Page Features:

News

ARTICLES OF INCORPORATION AND BYLAWS

As Amended and Restated by
the Members on April 6, 2016

Tri-State Generation and Transmission Association, Inc.
1100 West 116th Avenue
Westminster, Colorado 80234

(303) 452-6111

April 2016

AMENDED AND RESTATED ARTICLES OF INCORPORATION

AMENDED AND RESTATED BYLAWS

AMENDED AND RESTATED ARTICLES OF INCORPORATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

ARTICLE I
NAME

The name of this Corporation is TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

ARTICLE II
PURPOSES

This Corporation is organized for the purposes of:

(a) Generating, manufacturing, purchasing, acquiring and accumulating electric power and energy for its members and transmitting, distributing, furnishing, selling and disposing of such electric power and energy primarily to its members, provided that this Corporation may dispose of its electric power and energy to other than members insofar as it may have excess power and energy which can be disposed of on an interchange or sales basis for the ultimate benefit of its members; and

(b) Any other lawful purpose.

ARTICLE III
DURATION

This Corporation shall have perpetual existence.

ARTICLE IV
PRINCIPAL PLACE OF BUSINESS

The principal office of this Corporation shall be 1100 West 116th Avenue, Westminster, Colorado 80234, and this Corporation may maintain offices and operations at such other place or places in the United States as the Board of Directors may from time to time decide.

ARTICLE V
MEMBERSHIP AND VOTING

Section 1. Membership. Membership in this Corporation shall be limited to any cooperatively-owned power supplier, public power district or other entity accepted for membership by the Board of Directors of this Corporation in accordance with the Bylaws of this Corporation.

Section 2. Voting. Each member shall be entitled to one (1) vote and no more upon each matter submitted to a vote at a meeting of the members. Proxy voting, voting by mail, and cumulative voting shall not be permitted. At all meetings of the members at which a quorum is present all questions shall be decided by a vote of a majority of the members voting thereon, except as otherwise provided by applicable law, these Articles of Incorporation or the Bylaws of this Corporation.

ARTICLE VI
ORGANIZATIONAL STRUCTURE

This Corporation is formed without any purpose of direct gain or profit to itself, and it shall be operated on a cooperative, non-profit basis for the mutual benefit of its members. This Corporation's operations shall be conducted such that all members furnish capital for this Corporation through their patronage. This Corporation shall be obligated to account on a patronage basis to all its members as provided in the Bylaws. In no event shall this Corporation permit non-member sales on a patronage basis. In the event of dissolution, the disposition of the net earnings and the assets of this Corporation shall be as provided in the Bylaws.

ARTICLE VII
BOARD OF DIRECTORS

Section 1. Number and Qualifications. The business and affairs of this Corporation shall be managed by a Board of Directors. Except as set forth in Article XIII of the Bylaws, the number of directors shall equal the number of members of this Corporation and one (1) director shall be elected by each member. The names and post office addresses of the current directors of this Corporation, who shall manage the business and affairs of this Corporation until the next annual meeting of members or until their successors shall have been elected and shall have qualified according to law and the Bylaws of this Corporation, are:

Mr. Lyle Adair, Director
P.O. Box 2007
Gallup, NM 87301

Mr. Harold Baca, Director
P.O. Box 1331
Socorro, NM 87801

Mr. Lloyd E. Barling, Director
P.O. Box 5
Meeteetse, WY 82433

Mr. Robert Bledsoe, Director
Box 435
Hugo, CO 80821

Mr. James Boyd Jr., Director
151 State Highway 66
Longmont, CO 80501

Mr. Tony Casados, Director
P.O. Box 186
Tierra Amarilla, NM 87575

Mr. Wayne Child, Director
9816 Child Road
Cheyenne, WY 82009

Mr. Wayne R. Cobb, Director
HCR 75, Box 32
Merriman, NE 69218

Mr. Louis Costello, Director
7780 Highway 135
Gunnison, CO 81230

Mr. Jay W. Cox, Director
P.O. Box 77
Winston, NM 87943

Mr. William W. Dalles, Director
179 Dalles Lane
Laramie, WY 82070-9725

Mr. Bernard Fehringer, Director
631 Road 115
Sidney, NE 69162-4108

Mr. Jack Finnerty, Director
285 Slater Road
Wheatland, WY 82201

Mr. R.W. Gillespie, Director
P.O. Box 218
Springer, NM 87747

Mr. A. W. Gnatkowski, Director
Box 48 Ancho Route
Carrizozo, NM 88301

Mr. Leroy Gonzales, Director
P.O. Box 416
Peñasco, NM 87553

Mr. Rick L. Gordon, Director
P.O. Box 518
Simla, CO 80835-0518

Mr. Ed Hansen, Director
4554 County Road 74E
Livermore, CO 80536

Mr. Timothy Hoffner, Director
7513 Road 6
Wiggins, CO 80654

Mr. Harold Hopkin, Director
203 Lane 10-1/2
Powell, WY 82435

Mr. Donald Johnson, Director
37488 County Road 18
Holyoke, CO 80734

Mr. James H. Johnson, Director
P.O. Box 3135
Winter Park, CO 80482

Mr. Hal Keeler, Director
4555 Solana Road SE
Deming, NM 88030

Mr. Everett D. Kilmer, Director
Box 714
Lusk, WY 82225

Mr. Gary Kniss, Director
Route 2, Box 336
Bayard, NE 69334

Mr. Gerald W. Lorenz, Director
Route 1, Box 30
San Acacio, CO 81151

Mr. Gary L. Merrifield, Director
Box 152
Buena Vista, CO 81211

Mr. Davin Montoya, Director
7463 Highway 160
Hesperus, CO 81326

Mr. Christopher Moore, Director
P.O. Box 1491
Montrose, CO 81402

Mr. Marcellino Ortiz, Director
P.O. Box 117
Rowe, NM 87562

Mr. David R. Salazar, Director
P.O. Box 1052
Española, NM 87532

Mr. C. Jim Soehner, Director
38566 County Road 13
Wray, CO 80758

Mr. Wid Stevenson, Director
HCR 62, Box 39
Amistad, NM 88410

Mr. Darryl D. Stout, Director
P.O. Box 1056
Meeker, CO 81641

Mr. Harold Thompson, Director
P.O. Box 9
Jeffrey City, WY 82310-0009

Mr. Gary Wood, Director
P.O. Box 556
Cloudcroft, NM 88317

Mr. Jerry Underwood, Director
7000 Valley Road
Alliance, NE 69301

Mr. Bill Wright, Director
47818 Road X
Walsh, CO 81090-0267

Mr. Donald Tripple, Director
250511 County Road S
Gering, NE 69341

Mr. Robert Yeik, Director
Route 2, Box 317
Torrington, WY 82240

Mr. Travis Waller, Director
P.O. Box 7586
Pueblo West, CO 81007

Mr. Jack N. Young, Director
P.O. Box 443
Monticello, UT 84535

Ms. Kristi Westfall, Director
P.O. Box 212
Ouray, CO 81427

Mr. Terry Zeigler, Director
P.O. Box 618
Grant, NE 69140

Section 2. Director's Terms. Except as hereafter provided, the term of each director shall be from the time he or she is elected by his or her member and the fact of such election is certified to this Corporation by such member, in writing, until his or her member elects some other person to serve and the fact of such election is certified to this Corporation by such member in writing. Notwithstanding the foregoing, a person shall be eligible to be elected a director, and shall be eligible to remain a director, only if he or she has the qualifications set forth in the Bylaws. In addition, a director may be removed from the Board of Directors by the members in the manner provided in the Bylaws.

Section 3. Director Liability. No director of this Corporation shall be personally liable to this Corporation or its members for monetary damages for breach of fiduciary duty as a director, except for liability:

(a) for a breach of the director's duty of loyalty to this Corporation or its members;

(b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;

(c) for a transaction from which the director derived an improper personal benefit; or

(d) for an act or omission occurring prior to the date when the provisions of this Section (or predecessor thereto) became effective.

It is the intention of the members of this Corporation to eliminate or limit the personal liability of the directors of this Corporation to the greatest extent permitted under Colorado law. If amendments to the Colorado Revised Statutes are passed after the effective date of this Section which authorize cooperatives to act to further limit or eliminate the personal liability of directors, then the liability of the directors of this Corporation shall be limited or eliminated to the greatest extent permitted by the Colorado Revised Statutes, as so amended. Any repeal or modification of this Section by the members of this Corporation shall not adversely affect any right of or any protection available to a director of this Corporation which is in existence at the time of such repeal or modification.

Section 4. Indemnification. This Corporation shall indemnify persons who are or were directors and officers, and may indemnify employees and agents, to the full extent allowed by law, as set forth in the Bylaws.

ARTICLE VIII
BYLAWS

The Bylaws of this Corporation may be altered, amended or repealed by the members or the directors of this Corporation in the manner specified in the Bylaws.

AMENDED AND RESTATED BYLAWS OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

ARTICLE I
MEMBERSHIP

Section 1: Membership. Applicants for membership in this Corporation shall be eligible for membership by:

(a) Executing a written application for membership and agreeing to pay the membership subscription, if any, established by the Board of Directors from time to time;

(b) Agreeing to purchase from this Corporation electric power and energy as hereinafter specified in Section 2 of this Article I; and

(c) Subject to Sections 6 and 7 of Article II of these Amended and Restated Bylaws, agreeing to comply with and be bound by the Articles of Incorporation and Bylaws of this Corporation and any rules and regulations that relate to or concern the governance, oversight or management of this Corporation as adopted by the Board of Directors.

Each member of this Corporation as of the date of these Amended and Restated Bylaws shall be and continue to be members of this Corporation, until termination of such membership as contemplated herein. Subject to the foregoing, no applicant shall become a member unless and until it has been accepted for membership by the Board of Directors or the members. No member may hold more than one membership in this Corporation, and no membership in this Corporation shall be transferable. Each member shall be entitled to one (1) vote and no more upon each matter submitted to vote at a meeting of the members. Provision may be made in these Bylaws for additional classes of membership.

Section 2: Purchase of Electric Power and Energy.

(a) Unless otherwise specified by written agreement, each member shall terminate any contract which it may have for the purchase of electric power and energy from any other supplier when electric power and energy becomes available from this Corporation or as soon thereafter as it may legally do so, and shall purchase from this Corporation all electric power and energy used by the member. Each member shall pay therefor monthly at rates or on a basis to be determined from time to time in accordance with these Bylaws. In connection with such purchase, each member and this Corporation expressly disclaim any intent or agreement to be a partnership, joint venture, single or joint enterprise, or any other business form except that of a cooperative corporation and member

(b) It is expressly understood that amounts paid for electric power and energy in excess of the cost of service are furnished by members as capital in this Corporation, and not as profit of or to this Corporation, and each member shall be credited with capital so furnished as provided in these Bylaws. Each member shall also pay all amounts owed by such member to this Corporation as and when the same shall become due and payable.

(c) The electric power and energy purchase requirements set forth in this section shall apply to members' all-requirements contracts with Tri-State Generation and Transmission Association, Inc., in existence prior to the effective date of these Amended and Restated Bylaws.

Section 3: Withdrawal, Expulsion, Termination and Reinstatement of Membership.

(a) A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation. The

Board of Directors may, by the affirmative vote of not less than two-thirds (2/3) of all the directors, expel any member who fails to comply with any of the provisions of the Articles of Incorporation, Bylaws, or rules and regulations adopted by the Board of Directors from time to time, but only if such member shall have been given written notice by the Secretary of this Corporation that such failure makes it liable for expulsion from membership, and such failure shall have continued for at least ten (10) days after such notice was given. Any expelled member may be reinstated by vote of the Board or by vote of the members at any annual or special meeting.

(b) Upon withdrawal, cessation of existence, or expulsion of a member, the membership of such member shall thereupon terminate. Termination of membership in any manner shall not release a member from any debts due this Corporation nor impair the obligations of a member under any contract with this Corporation.

(c) The Board of Directors shall have authority to prescribe equitable terms and conditions to be applied when a member withdraws from membership, ceases existence, or is expelled from membership, and such may be done by policy or otherwise and may include procedures for the establishment of a trust fund to receive on behalf of such member's patrons all patronage capital as this Corporation may from time to time distribute to all of its members, or in lieu thereof procedures whereby a member proposing to withdraw from membership or ceases existence or who is expelled from membership, may elect to receive a discounted amount of patronage capital which has been allocated at the time of such withdrawal, cessation of existence, or expulsion from membership.

ARTICLE II
RIGHTS AND LIABILITIES OF MEMBERS

Section 1: Property Interest of Members. Members shall have no individual or separate interest in the property or assets of this Corporation, except that upon dissolution, after (a) all debts and liabilities of this Corporation shall have been paid, and (b) all capital furnished through patronage shall have been returned, as provided in these Bylaws, the remaining property and assets of this Corporation shall be distributed among the members in the proportion which the aggregate patronage of each bears to the total patronage of all members and former members pursuant to the provisions of applicable law.

Section 2: Non-Liability For Debts of Corporation. The private property of the members shall be exempt from execution or other liability for the debts of this Corporation and no member shall be liable or responsible for any debts or liabilities of this Corporation.

Section 3: Operation of Member's System. Except to the extent that failure shall be due to a cause beyond its control (such as failure of facilities, flood, earthquake, storm, fire, lightning, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, inability to obtain permits, licenses, rights-of-way or authorizations from any local, state or federal agency or any person, or restraint by court or public authority), which by exercise of due foresight the member could not have reasonably been expected to avoid, and which by exercise of due diligence it shall be unable to overcome, each member shall continuously operate and maintain its system for the full term of its all-requirements contract with this Corporation, using reasonable diligence to supply therefrom to patrons within its service area (without contraction due to acts of omission of the member) electric energy provided by this Corporation pursuant to the all-requirements contract. This provision is enforceable by specific performance and/or injunction.

Section 4: Transfers by a Member. A member shall not take or suffer to be taken, with respect to a person or entity other than another member, any steps for reorganization or to consolidate with or merge into any corporation, or to dissolve and wind up its affairs, or to sell, lease, transfer or otherwise dispose of all or a substantial portion of its assets without approval of the Board of Directors. The Board of Directors shall grant such approval if (a) either (i) the member pays and discharges this Corporation from further liability with respect to that member's proportionate share (as fairly apportioned by the Board) of this Corporation's long-term obligations (such as promissory notes, purchased electric energy, fuel, plant or equipment leases and the like) which have been incurred by this Corporation in order to have available electric energy service assuming compliance with these Bylaws; or (ii) the transferee or surviving corporation, as the case may be, is legally, financially and

technically capable of performing the member's obligations and assumes, by delivery to this Corporation of a written instrument (satisfactory in form to this Corporation), all of the member's obligations; (b) the transfer will not make obtaining by this Corporation of debt capital unduly more difficult, expensive or burdensome; and (c) other conditions reasonably set by the Board of Directors to financially protect this Corporation and its other members or required by or on behalf of the holders of any long-term debt obligations then outstanding are met.

Section 5: Debt Responsibility. Each member shall pay all amounts owed by it to this Corporation as and when the same shall become due and payable. Any amount owed by a member to this Corporation shall first be deducted and offset against any payment or distribution by this Corporation of (a) capital furnished by or allocated to the member pursuant to Article VII of these Bylaws, (b) refunds with respect to revenues paid by the member for services provided by this Corporation, and (c) other amounts that may be owed to that member.

Section 6: Independent Operation. This Corporation and member agree that the Corporation shall independently operate and maintain an electricity generation and transmission system and that the member will independently operate and maintain a separate electricity distribution system. This Corporation and member each acknowledge that standards, rules and/or regulations concerning the operation and maintenance of their separate systems are different and are the product of government and industry sources that apply separately to the two different systems, and that each will be solely responsible for undertaking reasonable efforts to operate and maintain their independent systems consistent with sound practices as derived from the standards, rules and/or regulations that apply to each separately.

Section 7: Control. This Corporation and member each acknowledge that the Corporation has no control over or the right, ability or authority to control the electric facilities, power lines, operations or maintenance practices of the member and that others, including the member's own governing board, management, member-customers and regulators, if any, control the member and are best situated to exercise control, oversight and/or guidance of the member's operations and maintenance practices.

ARTICLE III
MEETINGS OF MEMBERS

Section 1: Annual Meeting. The annual meeting of the members of this Corporation shall be held prior to September 30 of each year, and in any such location within any state where any of the members serve, the exact date and location to be determined by the Board of Directors. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of this Corporation.

Section 2: Special Meetings. Special meetings of the members of this Corporation shall be held at the place, time and date specified in the notice of the meeting. A special meeting may be called by (a) a resolution of the Board of Directors, upon a written request signed by any ten (10) directors, (b) by the Chairman and President, or (c) by twenty-five percent (25%) of the members by written petition submitted to the Chairman and President. It shall thereupon be the duty of the Secretary to cause notice of such meeting to be given as hereinafter provided.

Section 3: Notice of Meetings. Notice of a meeting of the members shall state the time, date, place, and in the case of a special meeting, purpose of the special meeting. The notice of a meeting of the members must be delivered by the Secretary at least thirty (30) days, but no more than sixty (60) days, before the date of the meeting, either personally, by appropriate telecommunication methods or by mail, to each member at the direction of the Chairman and President or the Secretary or the persons calling the meeting. If mailed, such notice shall be deemed delivered ten (10) days after it is deposited in the United States mail, postage paid and addressed to the member at its address as it appears on the records of this Corporation. Failure of any member to receive such notice shall not invalidate any action taken by the members at such meeting.

Section 4: Delegates. Each member shall be entitled to select one of its directors, trustees or general manager (which may, but is not required to be, the same person as the member's director serving on the Board), to act as the delegate, and alternate delegate or alternate delegates, at meetings of the members of this Corporation. Such delegate or alternate delegate(s) when so selected shall continue to be the delegate or alternate(s), respectively, of such member until he or she shall resign or cease to be a director, trustee or general manager of the member or the member shall have selected a successor delegate or alternate(s) and shall have notified the Secretary of this Corporation by a written instrument executed in the name of the member through its proper officer or officers. In the event any member shall fail to select a delegate or alternate delegate(s) as herein provided or the delegate or alternate(s) selected by such member are unable or unwilling to serve or for

any cause fail to so serve, the President of the member shall serve as its representative and cast its vote.

Section 5: Quorum. The presence of delegates representing at least a majority of the members shall constitute a quorum for the transaction of business at meetings of the members. If less than a quorum is present at any meeting, a majority of those delegates present in person may adjourn the meeting from time to time without further notice.

Section 6: Voting. At all meetings of the members at which a quorum is present, all questions shall be decided by a vote of a majority of the members voting thereon except as otherwise provided by law, the Articles of Incorporation or these Bylaws. Each member shall be entitled to only one (1) vote upon each matter submitted to a vote at a meeting of the members. In the event the delegate of a member is absent, or is unable or refuses to act, the alternate delegate(s) designated by such member shall act in his or her stead and shall cast the vote of such member. However, if both the delegate and the alternate delegate(s) of such member are absent, or are unable or refuse to act, then the President of such member may represent and cast the vote of such member as provided in Section 4 of this Article. No individual may represent more than one member.

ARTICLE IV
DIRECTORS

Section 1: General Powers. The business and affairs of this Corporation shall be managed by a Board of Directors which shall exercise all of the powers of this Corporation except such as are by law, the Articles of Incorporation or these Bylaws conferred upon or reserved to the members.

Section 2: Qualifications; Removal. No person shall be eligible to become or remain a director of this Corporation who is not a director, trustee or general manager of a member of this Corporation. The Board of Directors may remove any director for cause, which includes but is not limited to, a director holding office in violation of this Section.

Section 3: Election and Certification. Except as provided in Section 4 hereof, each member shall elect one (1) of its directors, trustees or its general manager to serve on the Board of Directors of this Corporation. Each member shall certify the name of such person to this Corporation by means of the Secretary of each member promptly informing the Secretary of this Corporation in writing of such person's name.

Section 4: Tenure of Office. Each director shall serve until his or her member elects some other person to serve and the fact of such election is certified to this Corporation by such member in writing; provided, however, that a person shall be eligible to be elected a director, and shall be eligible to remain a director, only if he or she has the qualifications set forth in these Bylaws.

Each existing director shall be deemed elected by the member of which he or she is a director, trustee or general manager unless such director's member elects some other person in accordance with the provisions of Section 3 hereof and the fact of such election is certified to this Corporation by such member in writing.

Section 5: Vacancies. A vacancy occurring in the Board of Directors shall be filled by the member losing representation because of the vacancy, electing some other person in accordance with the provisions of Section 3 hereof and certifying the fact of such election to this Corporation in writing.

Section 6: Compensation. Directors shall receive no salary for their services, as directors, except that by resolution of the Board of Directors a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of the Board of Directors and for attendance at each local, state, regional, and national meeting, hearing or convention of other organizations in which this Corporation has subscribed to membership under Section 1 of Article XI of these Bylaws, and for attendance at other meetings, hearings, or conventions where directors are acting on behalf of this Corporation and within the scope of their authority as directors of this Corporation. The purpose of authorizing directors to attend such meetings, hearings, and conventions shall be to permit them to do and perform all acts and things and to execute all powers which may be necessary, convenient or appropriate to accomplish the purpose for which this Corporation is organized. No director shall receive compensation for serving this Corporation in any other capacity, nor shall any close relative of a director receive compensation for serving this Corporation, unless payment and amount of compensation shall be specifically authorized by a vote of the members or the service by such director or close relative shall have been certified by the Board of Directors as an emergency measure; provided, however, this Corporation may provide a per diem compensation and reimbursement of out-of-pocket expenses for the Chairman and President, and for any other officer or director of this Corporation who is specifically authorized by the Board to undertake a specific assignment because the Chairman and President is unable to do so, so long as such compensation and expenses are reasonable in amount, are for services rendered to this Corporation and are expenses incurred in connection with said services, and that such services are in addition to services rendered as a director. Notwithstanding the foregoing, any per diem compensation which is

authorized for additional services shall not be more than 25% greater than this Corporation's per diem compensation for its directors.

Section 7: Action Taken Without a Meeting. Notwithstanding any other provision hereof, any action required by law to be taken at a meeting of the Board of Directors of this Corporation, or any action which may be taken at a meeting of the Board of Directors of this Corporation, may be taken without such meeting if a consent in writing, setting forth the action taken, shall be signed by all of the directors entitled to vote with respect to the subject matter thereof. Such consent shall have the same force and effect as a unanimous vote of such directors.

ARTICLE V
MEETINGS OF DIRECTORS

Section 1: Regular Meetings. A regular meeting of the Board of Directors shall be held without notice, immediately after, and at the same place as the annual meeting of the members. Regular meetings of the Board of Directors shall be held at least 12 times in each year at such times and places as the Board of Directors may provide. Such regular meetings may be held without notice other than appropriate Board action at a meeting fixing the time and place thereof. Meetings may be conducted by telephonic or video conference.

Section 2: Special Meetings. Special meetings of the Board of Directors may be called by the Chairman and President or a majority of the directors, and it shall thereupon be the duty of the Secretary to cause notice of such meeting to be given as hereinafter provided. The Chairman and President or the directors calling the meeting shall fix the time and place for the holding of the meeting.

Section 3: Notice of Directors' Meetings. Written notice of the time, place and purpose of any special meeting of the Board of Directors shall be delivered to each director not less than five (5) days previous thereto, either personally, by appropriate telecommunications methods or by mail, by or at the direction of the Secretary, or upon a default in duty by the Secretary, by the Chairman and President or the directors calling the meeting. If mailed, such notice shall be deemed to be delivered five (5) days after it is deposited in the United States mail and addressed to the director at his or her address as it appears on the records of this Corporation with postage thereon prepaid.

Section 4: Quorum. A majority of the directors shall constitute a quorum; provided, that if less than such majority of the directors is present at said meeting, a majority of the directors present may adjourn the meeting from

time to time; and provided further, that the Secretary shall notify any absent directors of the time and place of such adjourned meeting. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 5: Presence of Others. The Board of Directors may, at its option, exclude any person, other than a director, from a meeting of the Board of Directors.

ARTICLE VI
OFFICERS

Section 1: Number. The officers of this Corporation shall be a Chairman and President, Vice-Chairman, Secretary, Treasurer, two or more Assistant Secretaries and such other officers as may be determined by the Board of Directors from time to time.

Section 2: Election and Term of Office. The officers shall be elected by secret ballot, annually by and from the Board of Directors at the meeting of the Board of Directors held immediately after the annual meeting of the members. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be. Each officer shall hold office until the first meeting of the Board of Directors following the next succeeding annual meeting of the members or until such officer's successor shall have been elected and shall have qualified. A vacancy in any office shall be filled by the Board of Directors for the unexpired portion of the term.

Section 3: Removal of Officers by the Board of Directors. Any officer elected or appointed by the Board of Directors may be removed by the Board of Directors (1) if the officer ceases to be a board member for whatever reason, or (2) whenever in its judgment the best interest of this Corporation will be served thereby. In addition, any director may request removal of an officer by filing with the Secretary such a written list of reasons for removal together with a petition signed by at least twenty-five percent (25%) of the directors. The officer involved shall be informed in writing of the reasons at least thirty (30) days prior to the Board meeting at which removal is to be considered, and shall have an opportunity to be present or represented by counsel at the meeting and to present relevant evidence, and the director or directors seeking removal of such officer shall have the same opportunity.

Section 4: Chairman and President. The Chairman and President shall:

(a) Be the principal executive officer of this Corporation and, unless otherwise determined by the members or the Board of Directors, shall preside at all meetings of the members and the Board of Directors;

(b) Sign any deeds, mortgages, deeds of trust, notes, bonds, contracts or other instruments authorized by the Board of Directors to be executed, except in cases in which the signing and execution thereof shall be expressly delegated by the Board of Directors or by these Bylaws to some other officer or agent of this Corporation, or shall be required by law to be otherwise signed or executed; and

(c) In general perform all duties incident to the office of Chairman and President and such other duties as may be prescribed by the Board of Directors from time to time.

Section 5: Vice-Chairman. In the absence of the Chairman and President, or in the event of the Chairman and President's inability or refusal to act, the Vice-Chairman shall perform the duties of the Chairman and President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Chairman and President. The Vice-Chairman shall also perform such other duties as from time to time may be assigned to the Vice-Chairman by the Board of Directors.

Section 6: Secretary. The Secretary shall:

(a) See that the minutes of the meetings of the members and of the Board of Directors are kept in one or more books provided for the purpose;

(b) See that all notices are duly given in accordance with these Bylaws or as required by law;

(c) See that the corporate seal is affixed to all documents, the execution of which on behalf of this Corporation under its seal is duly authorized in accordance with the provisions of these Bylaws;

(d) See that a register of the names and post office addresses of all members is kept;

(e) See that the books and records of this Corporation are kept as required by law;

(f) See that there is kept on file at all times at the office of this Corporation a complete copy of the Articles of Incorporation and Bylaws of this Corporation containing all amendments thereto (which copy shall always be open to the inspection of any member), and at the expense of this Corporation that there is forwarded a copy of the articles and bylaws and all amendments thereto to each member and to each delegate who requests the same; and

(g) In general perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to the Secretary by the Board of Directors.

Section 7: Treasurer. The Treasurer shall:

(a) Have general charge and custody of and be generally responsible for all funds and securities of this Corporation;

(b) Be generally responsible for the receipt of and the issuance of receipts for all monies due and payable to this Corporation, and for the deposit of all such monies in the name of this Corporation in accordance with the provisions of these Bylaws; and

(c) In general perform all the duties incident to the office of Treasurer and such other duties as from time to time may be assigned to the Treasurer by the Board of Directors.

Section 8: Chief Executive Officer. The Board of Directors may appoint a Chief Executive Officer who may be, but who shall not be required to be, a member of any member of this Corporation, and who shall perform such duties and shall exercise such authority as the Board of Directors may from time to time vest in such Chief Executive Officer. The Chief Executive Officer may not serve as a director of this Corporation.

Section 9: Assistant Secretaries. The Board of Directors shall appoint at least two Assistant Secretaries, each of whom shall be a Board member, who shall assist the Secretary in performing the duties of that office. An Assistant Secretary, unless otherwise directed by the Board or the Secretary, may give all notices and attest to all documents of this Corporation in the stead of the Secretary, reporting to the Secretary with respect to all actions taken in his or her stead.

Section 10: Bonds of Officers. The Treasurer and any other officer or agent of this Corporation charged with responsibility for the custody of any of its funds or property shall (at this Corporation's expense) give bond in such sum and with such surety as the Board of Directors shall determine. The Board of Directors in its discretion may also require any other officer, agent or employee of this Corporation to give bond in such amount with such surety as it shall determine.

Section 11: Compensation. The powers, duties and compensation of officers and agents shall be generally determined by the Board of Directors, subject to the provisions of these Bylaws and applicable state law with respect to compensation for directors, and close relatives of directors.

Section 12: Reports. The officers of this Corporation shall submit at each annual meeting of the members reports covering the business of this Corporation for the previous fiscal year. Such reports shall set forth the condition of this Corporation at the close of such fiscal year.

Section 13: Executive Committee. An Executive Committee shall be established, consisting of nine (9) persons, namely the Chairman and President, the Vice-Chairman, the Secretary, the Treasurer and two Assistant Secretaries of this Corporation at any time duly elected by the Board of Directors and then holding office, plus three (3) members at large elected by and from the Board of Directors. At all times, at least two (2) Committee members shall be directors representing former members of Plains Electric Generation and Transmission Cooperative, Inc.; at least one (1) Committee member shall be a director representing a member headquartered in Colorado; at least one (1) Committee member shall be a director representing a member headquartered in Wyoming; and at least one (1) Committee member shall be a director representing a member headquartered in Nebraska. The Executive Committee, subject to applicable law, shall have the power to act for and in the place of the Board of Directors at any duly called meeting of the Board of Directors at which a quorum is found not to be present, and also in the event of the necessity of taking action under any circumstances that the Executive Committee shall consider and make a formal finding that a situation exists requiring action before a meeting of the Board of Directors can be called, but

only if a majority of the members of the Committee are present and at least five (5) of the Committee members shall vote in agreement upon any action taken by the Committee. It shall be the duty of the Secretary of the Corporation to prepare minutes of all meetings and actions of the Executive Committee, to record the same as a part of the minutes and records of the Board of Directors, and, after each such meeting or action, to promptly provide a copy of the minutes to each member of the Board of Directors.

ARTICLE VII
OPERATION AS A COOPERATIVE CORPORATION

Section 1: Cooperative Corporation. The Corporation and members agree that the Corporation is and shall organize as a cooperative corporation under the laws of the State of Colorado. No other business form arising from the relationship between the Corporation and the member is agreed to, intended or permitted, including without limitation partnership, joint venture, single or joint enterprise, nor is any agency, fiduciary or similar relationship agreed to, intended or permitted. The sole relationship between this Corporation and each member shall be that of a cooperative corporation and member as provided by Colorado statutory law.

Section 2: Interest or Dividends on Capital Prohibited. The Corporation shall at all times be operated on a cooperative non-profit basis for the mutual benefit of its members. No interest or dividends shall be paid or payable by the Corporation on any capital furnished by its members.

Section 3: Patronage Capital in Connection With Furnishing Electric Energy. In the furnishing of electric energy the Corporation's operations shall be so conducted that all members will through their patronage furnish capital for the Corporation. In order to induce patronage and to assure that the Corporation will operate on a non-profit basis, the Corporation is obligated to account on a patronage basis to all its members for all amounts received and receivable from the furnishing of electric power and energy in excess of the sum of (a) operating costs and expenses properly chargeable against the furnishing of electric power and energy, (b) amounts required to offset any losses incurred during the current or any prior fiscal year, and (c) adjustments to reserves or deferred credit accounts for the purpose of stabilizing margins and rate increases from year to year. The sum of subparagraphs (a), (b) and (c) shall be identified as "operating costs and expenses" for purposes of this Article. All amounts in excess of operating costs and expenses at the moment of receipt by the Corporation are received with the understanding that they are furnished by the members as capital and are not profit to or from the Corporation or its operations. The Corporation is obligated to allocate by credits, to a capital account for each member, all such amounts in excess of operating costs and

expenses. The books and records of the Corporation shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each member is clearly reflected and credited in an appropriate record to the capital account of each member, and the Corporation shall, within a reasonable time after the close of the fiscal year, notify each member of the amount of capital so credited to such member's account. All such amounts credited to the capital account of any member shall have the same status as though they had been paid to such member in cash in pursuance of a legal obligation to do so and such member had then furnished the Corporation corresponding amounts for capital.

All other amounts received by the Corporation from its operations in excess of costs and expenses shall, insofar as permitted by law, be used to offset any losses incurred during the current or any prior fiscal year; and to the extent not needed for that purpose, allocated to its members on a patronage basis, and any amount so allocated shall be included as a part of the capital credited to the accounts of members, as herein provided.

Allocation units may be established by the Board of Directors on a reasonable and equitable basis. If allocation units are established, the Board of Directors shall adopt such reasonable and equitable accounting procedures as will, in the Board's judgment, equitably allocate among such allocation units this Corporation's items of income, gain, expense and loss. The Board of Directors may establish procedures under which a net loss incurred within an allocation unit may be offset against the net margins earned by another allocation unit or units and the right, if any, of such other allocation unit or units to recoup such offset out of future net margins of the allocation unit that incurred the net loss. The Corporation shall give reasonable notice to each member of the effect of such offset on its capital credit allocation.

In the event of dissolution or liquidation of the Corporation, after all outstanding indebtedness of the Corporation shall have been paid, outstanding capital credits shall be retired without priority on a pro rata basis before any payments are made on account of property rights of members. If, at any time prior to dissolution or liquidation, the Board of Directors shall determine that the financial condition of the Corporation will not be impaired thereby, the capital then credited to members' accounts may be retired in full or in part and such may be done by policy or otherwise.

Capital credited to the account of each member shall be assignable only on the books of the Corporation pursuant to written instruction from the assignor and only to successors in interest in the business or the physical assets of such member unless the Board of Directors, acting under policies of general application, shall determine otherwise.

The members of the Corporation, by dealing with the Corporation, acknowledge that the terms and provisions of the Articles of Incorporation and Bylaws shall constitute and be a contract between the Corporation and each member and both the Corporation and the member are bound by such contract, as fully as though each member had individually signed a separate instrument containing such terms and provisions. The provisions of this article of the Bylaws shall be called to the attention of each member of the Corporation by keeping a copy of such Bylaws available for inspection by any member in the Corporation's office.

ARTICLE VIII
DISPOSITION OF PROPERTY

This Corporation may not sell, mortgage, lease or otherwise dispose of or encumber all or any substantial portion of its property unless such sale, mortgage, lease or other disposition or encumbrance is authorized at a meeting of the members thereof by the affirmative vote of not less than two-thirds (2/3) of all the members of this Corporation, and unless the notice of such proposed sale, mortgage, lease or other disposition or encumbrance shall have been contained in the notice of the meeting. It is understood, however, that this Article shall not apply to a merger or consolidation of this Corporation with any other cooperative corporation, and it is further understood that, notwithstanding anything herein contained, the Board of Directors of this Corporation, without the authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a deed or deeds of trust upon, or the pledging or encumbering of, any or all the property, assets, rights, privileges, licenses, franchises, and permits or other things of value of this Corporation, whether acquired or to be acquired and wherever situated, as well as the revenues and income therefrom, all upon such terms and conditions as the Board of Directors shall determine, to secure any indebtedness of this Corporation.

ARTICLE IX
SEAL

The corporate seal of this Corporation shall be in such form as may be approved by the Board of Directors from time to time.

ARTICLE X
FINANCIAL TRANSACTIONS

Section 1: Contracts. Except as otherwise provided in these Bylaws, the Board of Directors may authorize any officer or officers, agent or agents to enter into any contract or execute and deliver any instrument in the name and on behalf of this Corporation, and such authority may be general or confined to specific instances.

Section 2: Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, and all notes, bonds or other evidences of indebtedness issued in the name of this Corporation shall be signed by such officer or officers, agent or agents, employee or employees of this Corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors.

Section 3: Deposits. All funds of this Corporation shall be deposited from time to time to the credit of this Corporation in such financial institutions selected by the Board of Directors. Such financial institutions must have deposits insured. In addition, funds of this Corporation also may be deposited in such investment securities or funds as the Board of Directors may elect.

Section 4: Fiscal Year. The fiscal year of this Corporation shall begin on the first day of January of each year and shall end on the 31st day of December of the same year.

ARTICLE XI
MISCELLANEOUS

Section 1: Membership in Other Organizations. This Corporation may become a member of or purchase stock in any other organization without an affirmative vote of the members, upon an express determination by the Board of Directors that such membership or purchase of stock is in the best interests of this Corporation.

Section 2: Interested Transactions. No contract or other transaction between this Corporation and a member shall be affected or invalidated by reason of the mere fact that any one (or more) of the Board members, officers or other members of the management of this Corporation is (or are) interested in or is (or are) a member(s), trustee(s), officer(s), or employee(s) of such member or of a cooperative corporation, nonprofit corporation, partnership, joint venture, trust, unincorporated association or other entity in which the member is interested or is (or are) a patron(s) or interested in a patron(s) of such member.

Such an interested Board member may be counted for the purpose of determining the presence of a quorum, and he or she may participate in any discussion and the voting relating to such a contract or other transaction. Nothing herein shall affect, however, that Board member's responsibility to perform his or her duties in good faith, in a manner the Board member believes to be not opposed to the best interest of this Corporation and otherwise in accordance with applicable law.

Section 3: Waiver of Notice. Any member, delegate or director may waive in writing any notice of a meeting required to be given by these Bylaws. The attendance of a member, delegate or director at any meeting shall constitute a waiver of notice of such meeting by such member, delegate, or director, except in case a member, delegate, or director shall attend a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting has not been lawfully called or convened.

Section 4: Accounting System and Reports. The Board of Directors shall cause to be established and maintained a complete accounting system which, among other things, shall conform to Generally Accepted Accounting Principles (GAAP) and to the applicable laws and rules and regulations of any regulatory body having jurisdiction and applicable provisions of this Corporation's loan contracts. The Board of Directors also shall, after the close of each fiscal year, cause to be made a full and complete audit of the accounts, books and financial condition of this Corporation as of the end of each fiscal year. Such audit reports shall be submitted to the members at the next following annual meeting.

Section 5: Indemnification:

(a) Officers', Board Members' and Employee's Indemnification. Subject to paragraphs (c), (d) and (e) of this Section 5, this Corporation shall indemnify any person who is or was a Board member, Officer or employee of this Corporation and any person who, while a Board member or Officer of this Corporation, is or was serving at the request of this Corporation as a director, Officer, partner, employee or agent of another cooperative or of a foreign or domestic corporation or nonprofit corporation, partnership, joint venture, trust, unincorporated enterprise or employee benefit plan or trust, and who is made a party to any action, suit or proceeding, civil or criminal, by reason of holding or having held such office or position.

(b) Agents' Indemnification. Subject to paragraphs (c), (d) and (e) of this Section 5, this Corporation may indemnify any person, other than a Board member, an Officer or employee acting as such, who has or had an agency relationship with this Corporation and who is made a party to any action, suit or proceeding, civil or criminal, by reason of service during the course of such relationship, including service at the request of this Corporation as a trustee, Officer, partner, employee or agent of another cooperative or of a foreign or domestic corporation or nonprofit corporation, partnership, joint venture, trust, unincorporated association, other incorporated or unincorporated enterprise or employee benefit plan or trust.

(c) Indemnification Disqualification. A Board member, Officer or other person shall not be indemnified in connection with a proceeding by or in the right of this Corporation in which he or she was adjudged liable to this Corporation. A Board member, Officer or other person shall, further, not be indemnified in connection with any proceeding charging improper personal benefit derived by him or her, whether or not involving action in an official capacity, in which he or she was adjudged to be liable on the basis that the personal benefit was improperly derived. There shall be no indemnification unless the Board finds that the indemnitee:

(i) conducted himself or herself in good faith;

(ii) reasonably believed (I) in the case of conduct in an official capacity, that his or her conduct was in the best interests of this Corporation, and (II) in all other cases, that his or her conduct was at least not opposed to the best interests of this Corporation; and

(iii) in the case of any criminal proceeding, had no reasonable cause to believe the person's conduct was unlawful.

Termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person is disqualified from receiving indemnification.

(d) Indemnification Amount. Indemnification shall, pursuant to paragraph (a), and may pursuant to paragraph (b), be made against judgments, penalties, fines, settlements and compromises, cost and expenses, including attorneys' fees, reasonably incurred by or on behalf of the indemnitee in connection with the defense of such proceeding. Reasonable expenses incurred by a Board member, Officer or other person who is a party to a proceeding may be paid or reimbursed by this Corporation in advance of the final disposition of such proceeding if:

(i) such person furnishes this Corporation with a written affirmation of his or her good faith belief that he or she is not disqualified from receiving indemnification under paragraph (c) of this Section;

(ii) such person furnishes to this Corporation a written undertaking by or on behalf of the person to repay such amount if it shall ultimately be determined that he or she is disqualified or, in the case of a person other than a Board member or an Officer acting as such, not fully indemnified in the Board's discretion; and

(iii) a determination is made that the facts then known to those making the determination would not preclude indemnification.

(e) Indemnification Procedure. No indemnification under paragraphs (a) and (b) of this Section 5 shall be made unless authorized in the specific case after a determination has been made that indemnification is permissible in accordance with

applicable state law and these Bylaws. Such determination shall be made:

(i) by the Board by a majority vote of a quorum of Board members not at the time parties to the proceeding;

(ii) if such a quorum cannot be attained, by a majority vote of a committee of the Board duly designated to act in the matter by a majority vote of the full Board, in which designated Board members who are parties may participate, and consisting solely of two or more Board members not at the time parties to the proceeding;

(iii) by special legal counsel, selected by the Board or a committee thereof by vote as set forth in subparagraphs (i) or (ii) of this paragraph (e) or, if the requisite quorum of the full Board cannot be obtained therefor and such committee cannot be established, by a majority vote of the full Board, in which selection Board members who are parties may participate; or

(iv) pursuant to a resolution of a majority of the members present and voting at any annual or special meeting.

Authorization of indemnification and determination as to the amount thereof shall be made in the same manner as the permissibility determination, except that if the permissibility determination is made by special legal counsel, authorization and amount determination shall be made in a manner specified in paragraph (e)(iii) of this Section 5 for the selection of such counsel.

ARTICLE XII
AMENDMENTS

These Bylaws may be altered, amended or repealed by the members of this Corporation at any regular or special meeting provided that the notice of such meeting shall have contained a copy of the proposed alteration, amendment or repeal. At any such meeting, the proposed alteration, amendment or repeal

may be amended by the affirmative vote of a majority of the members of this Corporation. These Bylaws may also be altered, amended or repealed by the affirmative vote of not less than two-thirds (2/3) of the members of the Board of Directors at any regular or special meeting of said Board, provided that written notice of the proposed alteration, amendment or repeal shall be mailed to each member of the Board of Directors and each member of this Corporation not less than forty-five (45) days before the date of such meeting. The directors, at such meeting, may amend the proposed alteration, amendment or repeal, but the same shall not become effective until written notice thereof has been mailed to each member of this Corporation not less than forty-five (45) days before the effective date thereof. At any time prior to the date of such meeting or prior to the effective date of such amended alteration, amendment or repeal, any ten (10) or more members of this Corporation may file a written resolution with the Secretary of this Corporation in protest of the proposed alteration, amendment or repeal of these Bylaws or of the amended alteration, amendment or repeal of these Bylaws, and in such event, said alteration, amendment or repeal of these Bylaws, or said amended alteration, amendment or repeal of these Bylaws, shall be of no validity unless approved by the members of this Corporation as heretofore provided.

Any ten (10) or more members of this Corporation may file a written resolution with the Secretary of this Corporation proposing an alteration, amendment or repeal of these Bylaws, and upon such resolutions being filed, the proposed alteration, amendment or repeal shall be placed upon the agenda of the next regular meeting of the Board of Directors for consideration and determination by the Board of Directors in the manner above described. If the determination of the Board of Directors is in the negative, the proposed alteration, amendment or repeal shall be placed upon the agenda of the next regular or special meeting of the members of this Corporation and submitted to the members of this Corporation for consideration and determination at such meeting. If the aforesaid resolution is not received by the Secretary of this Corporation in time sufficient to permit such resolution to be timely considered and determined by the Board of Directors prior to the next regular or special meeting of the members of this Corporation, then the proposal shall be noticed and submitted directly to the members of this Corporation in the manner just described.

ARTICLE XIII
MERGER OR CONSOLIDATION

In the event of a merger or consolidation of two or more members of this Corporation, any member which thereby will cease to exist may, if it wishes, prior to such time, transfer to the surviving or new member its right to elect a

director to the Board of Directors of this Corporation, and such right shall continue to exist, if the transferee member so wishes, for a period of not to exceed three (3) years from the date of the merger or consolidation.

If a member which will cease to exist chooses to transfer its right to elect a director to the Board of Directors of this Corporation to the surviving or new member, the transferee member shall have the right to elect a person to fill such position, if the transferee member so wishes, for a period of not to exceed three (3) years from the date of the merger or consolidation.

Each person so elected shall be entitled to one (1) vote and no more upon each matter submitted to a vote at a meeting of the Board of Directors. In situations where the presence or vote of a majority of directors is required, the presence of each such person shall be counted in determining whether or not a quorum exists, and the vote of each such person shall be counted in determining whether or not the necessary vote has been obtained.

Notwithstanding the foregoing, in the event of a consolidation of two or more members of this Corporation, and in the event one or more of such members transfers its right to elect a director to the Board of Directors of this Corporation to the new member, the new member will not have more votes, in total, than the number of rights assigned to it by the member(s) which will cease to exist.

In the event a member does not merge into or consolidate with another member, but instead sells all or substantially all of its assets to another member and thereupon ceases to exist, the foregoing provisions of this Article shall apply to such transaction.

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Decision No. R13-1119-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; WHITE RIVER ELECTRIC ASSOCIATION, INC.; BP AMERICA PRODUCTION COMPANY, ENCANA OIL & GAS (USA), INC., ENTERPRISE PRODUCTS OPERATING LLC, AND EXXONMOBIL PRODUCTION COMPANY AS MEMBERS OF THE RURAL ELECTRIC CONSUMER ALLIANCE; AND KINDER MORGAN CO_2 COMPANY, LP,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ DENYING MOTION TO DISMISS AND CERTIFYING INTERIM DECISION AS IMMEDIATELY APPEALABLE

Mailed Date: September 11, 2013

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I. STATEMENT

A. Background

1. Complaint

1. On March 4, 2013, La Plata Electric Association, Inc. (La Plata) and Empire Electric Association, Inc. (Empire), acting on behalf of themselves and their members; White River Electric Association, Inc. (White River), acting on behalf of itself and its members; the Rural Electric Consumer Alliance (Industrial Complainants), which consists of BP America Production Company (BP), Encana Oil & Gas (USA), Inc. (Encana), Enterprise Products Operating LLC (Enterprise), and ExxonMobil Power and Gas Services Inc., on behalf of ExxonMobil Production Company, a division of ExxonMobil Corporation (Exxon); and Kinder Morgan CO_2 Company, L.P., as industrial customers of the above mentioned cooperative electric associations (collectively, Complainants), pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-1302 of the Commission's Rules of Practice and Procedure, filed a Formal Complaint which initiated this proceeding before the Colorado Public Utilities Commission (Commission).

2. The Formal Complaint alleges that Tri-State Generation and Transmission Association, Inc. (Tri-State or Respondent) imposed a new rate referred to as "A-37" implemented on January 1, 2013 which replaced the previously effective "A-36" rate. Complainants allege that the A-37 rate resulted in a dramatic increase in rates for high load factor distribution cooperatives and high load factor customers without regard to the cost of providing

service. Further, Complainants allege that the A-37 rate results in a 10 to 18 percent rate increase for high load factory customers and cooperatives that serve high load factor customers based solely on Respondent's new allocation and rate design methodology. Additionally, Complainants allege that the A-37 rate has an added deleterious impact on residential time-of-use customers.

3. Complainants explain that generally, cost allocation and rate design methodology includes two main components. Here however, the demand charges are not collected based on peak demands as before. Instead, demand charges are assessed based exclusively on calculated average demands. Complainants state that an allocation and rate based on a customer's calculated average demand is mathematically equivalent to an allocation and rate based on a customer's energy consumption. Consequently, the A-37 methodology is equivalent to an all-energy allocation and rate which is a method previous rejected by the Commission. Second, Complainants allege that Tri-State has adopted an arbitrary on-peak/off-peak differential for its wholesale energy rates at a ratio of 4 to 1, which when coupled with the calculated average demand, collapses to an all-energy rate and results in an on-peak/off-peak differential of only 1.4 to 1 ratio which is insufficient to provide the proper price signals to retail customers to encourage them to shift load to off-peak periods.

4. Complainants argue that the cumulative effect of the A-37 methodology is a significant increase in rates for high-load factor distribution cooperatives and high-load factor member-customers, and a simultaneous lowering of rates for low-load factor distribution cooperatives and low-load factor customers without regard to the cost of providing service.

5. Complainants make the following claims regarding Tri-State: that it failed to file its A-37 rate with the Commission pursuant to § 40-3-103, C.R.S., including schedules showing all rates collected together with all rules, regulations, and contracts that in any manner affect or

relate to its rates; that it failed to provide 30 days' notice pursuant to § 40-3-104, C.R.S., of the A-37 rate, and failed to seek a waiver of that requirement; that the A-37 rate cost allocation and design is unjust and unreasonable pursuant to §§ 40-3-101 and 40-3-111(1), C.R.S.; and that the A-37 rate is preferential or discriminatory pursuant to §§ 40-3-106(1), 111(1) and 111(4)(a), C.R.S.

6. As a result, Complainants seek review by the Commission of the new cost allocation and rate design methodology as applied to Tri-State's tariff rates to its Colorado member-systems and their retail customers. Complainants also seek to prohibit Tri-State from charging the A-37 rate from January 1, 2013 until such time as Tri-State complies with §§ 40-3-103 and 104, C.R.S., and puts its rates on file with the Commission. Complainants request a Commission Decision under §§ 40-3-101 and 102, C.R.S., finding that Tri-State's cost allocation and rate design methodology implemented on January 1, 2013 is unjust, unreasonable, preferential, and discriminatory. Additionally, Complainants request a Commission Decision under §§ 40-3-101 and 102, and §§ 40-3-111(1) and (2)(a), C.R.S., establishing a cost allocation and rate design methodology for Tri-State that is just, reasonable, not preferential and not discriminatory, as well as a Decision requiring Tri-state to pay an appropriate refund to any cooperative that was billed under the A-37 rate higher than it would have been billed under the A-36 rate, as well as any additional or other relief the Commission deems appropriate.

7. On March 15, 2013, Commission Director Mr. Doug Dean served Tri-State with an Order to Satisfy or Answer requiring it to satisfy the matters in the Complaint or answer the Complaint in writing within 20 days from service upon Respondent of the Order. In addition, Respondent was served with an Order Setting Hearing and Notice of Hearing. That Order set this matter for an evidentiary hearing on May 22, 2013.

8. On March 21, 2013, at its regular Weekly Meeting, the Commission, by minute entry, referred this Formal Complaint to an Administrative Law Judge (ALJ). The matter was subsequently assigned to the undersigned ALJ.

2. Motion to Dismiss

9. On April 4, 2013, Tri-State filed a Motion to Dismiss Formal Complaint (Motion to Dismiss). Tri-State asserts that this Commission is without jurisdiction to hear this Formal Complaint under several theories including that the Commerce Clause[1] prohibits Commission rate regulation of Tri-State and that Commission jurisdiction over its rates would improperly interfere with Tri-State's contracts with its Member Systems. The Formal Complaint should also be dismissed, according to Respondent, since the Commission has never regulated Tri-State's rates and the Commission's rules have recognized that fact for a period of time. While the Formal Complaint requires that the Commission review the retail rates of Tri-State's Member Systems, it argues that the Formal Complaint fails to comply with the process required by statute. Tri-State also asserts that it has not violated any statute or Commission rule. Regarding standing, Tri-State takes the position that the Industrial Complainants lack standing to bring the Formal Complaint and the Complainant Member Systems lack standing to assert Claims Three and Four of the Formal Complaint.

10. Tri-State argues that its integrated, interconnected electrical system operates solely in interstate commerce, integrated into an interstate grid to facilitate the generation and transmission of electricity across its four-state service area (Colorado, Nebraska, New Mexico, and Wyoming). Tri-State represents that its Colorado member systems do not receive electricity

[1] The power is reserved to Congress to regulate commerce among the several states. U.S. Const. art. 1, sec. 8, cl. 3.

solely, or even substantially, from its generation resources located in Colorado. Rather, Tri-State maintains that it injects electricity into the regional grid from its various generation resources located in Arizona, Colorado, New Mexico, and Wyoming, as well as from independent power producers in those states, as part of interstate commerce that serves all of Tri-State's member systems no matter which state those systems are located. Tri-State represents that it depends on the operation of all the generation and transmission facilities in all four of the states in which it operates in order to meet its power sales and service obligations.

11. Because Tri-State operates solely in interstate commerce, it maintains that any Commission regulation of its wholesale rates would represent a *per se* violation of the Commerce Clause because it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of Colorado even though the commerce may have effects within Colorado. Tri-State takes the position (more fully addressed *infra*) that since it is involved solely in interstate commerce, the effects of state regulation on interstate commerce are not merely incidental, but are rather significant and substantial due to the economic protectionism present in this proceeding.[2] As an example, Tri-State asserts that were this Commission to suspend the A-37 rate (or rate design) in whole or in part, and that a lower rate or different rate design should be applied to Tri-State's Colorado member systems, this would force Tri-State to increase its wholesale rate to its member systems in Nebraska, New Mexico, and Wyoming.

12. Tri-State also points to various Commission Decisions issued over the years for the proposition that the Commission has recognized that it lacks jurisdiction over Tri-State's

[2] Tri-State argues that because it owns and operates assets in five different states and provides wholesale electric service in four states, each of those states would have an interest in ensuring that its rates were the lowest in the Tri-State system, which would ultimately result to disallowance of full cost recovery for Tri-State.

rates and charges. Tri-State asserts that this recognition of lack of Commission oversight has appropriately existed since 1975.

13. In addition, Tri-State takes the position that Colorado Public Utilities Law (*see*, Articles 1 through 7 of Title 40, Colorado Revised Statutes) supports the conclusion that generation and transmission cooperatives (G&Ts) such as Tri-State are not subject to Commission regulation. Tri-State cites to § 40-2-112(2), C.R.S., which states that nonprofit G&Ts may be subject to less regulation and no rate regulation by the Commission. As well, Tri-State notes § 40-7-113.5, C.R.S., which exempts G&Ts from Commission authority to impose civil penalties for violations of the Public Utilities Law.

14. As regards the participation of the Industrial Complainants, Tri-State argues that they are not member systems of Tri-State and do not receive retail electric service from Tri-Sate. Rather, the Industrial Complainants receive electric service from Tri-State's member systems which set their own retail rates independent of Tri-State and provide notice to their own customers such as the Industrial Complainants of any changes to those retail rates. Since the Complainant member systems have each voted to exempt themselves from Commission jurisdiction under § 40-9.5-103, C.R.S., the Industrial Complainants are precluded from indirectly creating Commission jurisdiction where none exists, since the Commission has no authority over the retail rates of the Complainant member systems.

15. Tri-State also claims that is has not violated any applicable provision of Colorado Public Utilities Law or the Commission's regulations. Tri-State enumerates the statutes under which Complainants argue that Tri-State is in violation and counters that it is not in violation of any of the statutes. Tri-State indicates that it has not violated § 40-3-103, C.R.S., because the Commission has no rules pursuant to § 40-3-103, C.R.S., which require G&Ts such as Tri-State

to provide and keep on file with the Commission documents such as its current Colorado tariffs, forms of contracts, and electric service agreements.[3]

16. Tri-State further asserts that it has not violated § 40-3-104, C.R.S., or Rule 3109 of the Commission's Rules Regulating Electric Utilities 4 CCR 723-3, which require a utility to file a new or changed tariff with the Commission. Tri-State argues that Rule 3109 is not applicable to G&Ts such as Tri-State, nor is § 40-3-101, C.R.S., implemented through Rules 3108, 3109, and 3110. Tri-State goes on to state that it has also not violated §§ 40-3-106(1) and 111(1), C.R.S., which are implemented through Rules 3108 through 3110 since those rules are not applicable to Tri-State. Additionally, because the "postage stamp" rate Tri-State charges to all its member systems is uniform, there is no distinction among customers and since the rate is charged uniformly, no preferential or discriminatory treatment exists. To the extent the A-37 rate affects Tri-State's member systems differently based on load characteristics, Tri-State argues that this does not equate to preferential or discriminatory rates or an "unreasonable difference."

17. Finally, Tri-State maintains that it has not violated § 40-6-111(4), C.R.S., since the Commission lacks authority to suspend Tri-State's wholesale rates. Because § 40-6-111(4), C.R.S., does not provide a different or independent basis for relief from §§ 40-3-106(1) or 111(1), C.R.S., then the same Commission Rules (3109 through 3110) are applicable to § 40-6-111(4), C.R.S., as to §§ 40-3-106(1) and 111(1), C.R.S.

18. Tri-State contends that Commission regulation of Tri-State's wholesale rates would interfere with Tri-State's wholesale electric service contracts with its member systems.

[3] Tri-State points to Commission Rule 4 *Code of Colorado Regulations* 723-3-3108 of the Commission's Rules Regulating Electric Utilities which require utilities to keep those documents on file regarding their retail electric service.

Tri-State describes the rate setting process its board of directors (BOD) implements in setting new rates. Tri-State's mission according to the company is to provide its member systems with electricity at the lowest reasonable price on a basis of mutuality, which provides Tri-State with the incentive to keep rates as low as possible based on its cooperative business model. In addition, each member system in Colorado has a representative on the BOD who was able to vote on the A-37 rate which allowed member systems to fully participate in the democratic process of rate setting. Because each Tri-State member system has entered into a wholesale electric service contract which obligates them to pay the rates duly adopted by Tri-State's BOD, Tri-State Contends that Complainant member systems seek to avoid their contractual obligations by improperly invoking Commission jurisdiction here to interfere with those contractual obligations.

19. In addition, Tri-State argues that the Industrial Complainants lack standing to bring the claims asserted. According to Tri-State, the Industrial Complainants have suffered no actual injury-in-fact which is "sufficiently direct and palpable: to present the Commission with fair assurance that the case is proper for Commission resolution." Tri-State maintains that this is so because it provides wholesale electric service to its Colorado member systems and not directly to the Industrial Complainants. In addition, Tri-State takes the position that it has nothing to do with the rate **design that its member systems utilize to charge retail rates. Consequently, the rate design implemented** by the member systems providing electric service to the Industrial Complainants further distances Tri-State from the alleged injury.

20. Tri-State notes that the Complainants assert § 40-6-108(1)(b), C.R.S., for Claims Three and Four, and § 40-6-111(4). C.R.S., for the Fifth Claim which provide them standing. Industrial Complainants have no legally protected rights or cognizable interests involved in

Claims Three, Four, and Five, while the Complainant member systems have no legally protected rights or cognizable interests in Claims Three and Four, according to Tri-State.

21. Regarding the § 40-6-108(1)(b), C.R.S., source of the claim for standing for Claims Three and Four, Tri-State indicates that the statute requires the signature of at least 25 customers of Tri-State for standing to bring a claim under that statute. Because the Industrial Complainants are not customers of Tri-State, they are therefore without standing. Another infirmity pointed out by Tri-State as to standing under § 40-6-108(1)(b), C.R.S., is that legal counsel for Complainants signed the Complaint rather than actual customers as required by the statute. Further, § 40-6-108(1)(b), C.R.S., was not meant to apply to G&Ts since it only has 18 Colorado member systems.

22. As to § 40-6-111(4)(a), C.R.S., Tri-State maintains that since the Industrial Complainants are not members or customers of Tri-State, they therefore lack standing to assert the Fifth Claim. As such, Tri-State argues that the Complainants have no standing to bring the Third and Fourth Claims of the Complaint, and the Industrial Complainants lack standing to bring Claim Five.

3. Complainants' Response to Motion to Dismiss

23. Complainants argue that the Commerce Clause does not preclude Commission jurisdiction over Tri-State in this Complaint. Complainants argue that Commission jurisdiction is not invalid *per se* because economic protectionism is not present here since Complainants have not asked for Colorado rates to be lower than those of other states or that other states should be asked to pay more than their fair share of the percentage of Tri-State's revenue requirements.[4]

[4] In addition, Complainants argue that Tri-State does not allege that the underlying statutes or rules discriminate against out-of-state suppliers on their face, or that any in-state competitors are subject to more lenient treatment or special benefits under Colorado statues or rules.

Rather, since Colorado statutes and Commission rules apply equally to interstate and intrastate utilities providing services in Colorado, there is no economic protectionism.

24. Complainants go on to state that no state action exists here that would directly control commerce occurring wholly outside the boundaries of Colorado, which is also an indication that the assertion of Commission jurisdiction here is not invalid *per se*. Complainants also describe Tri-State's electric offerings as having a strong intrastate component, as well as being subject to Commission jurisdiction in several contexts presumably based on Colorado law and Colorado state interests.

25. Given Tri-State's representations that its facilities are so interlinked that its wholesale sales in Colorado are necessarily done in interstate commerce, then by Tri-State's own logic, any Commission ruling would have to impact Colorado, as part of its interstate network. As a result, there can be no *per se* violation based on solely extraterritorial impact in this proceeding.

26. Under a balance test approach, Complainants assert that the Commission may review Tri-State's rate design without violating the Commerce Clause under the *Pike v. Bruce Church* balancing test. This is so because state statutes regulate Tri-State evenhandedly to effectuate a legitimate local public interest, and any effects on interstate commerce are merely incidental. Complainants argue that the Commission regulates the rates of other public utilities that operate in interstate commerce such as Black Hills Corporation and Xcel Energy. Complainants note that the Commission has been able to work with these and other utilities to reasonably accommodate the interstate nature of some of the utilities' operations. Tri-State offers no compelling reason why the Commission could not accomplish the same for it according to Complainants.

27. Complainants also argue that any effects of Commission rate regulation on Tri-State's interstate interests would only be incidental and no more than those experienced by other interstate utilities as Complainants are not seeking a sweeping Commission decision, nor are they asking Tri-State to decrease its overall Colorado rates to the detriment of other states, or objecting to an across the board rate increase as long as it is lawfully established.

28. Because Tri-State has almost 1500 megawatts (MW) of generating capacity in Colorado alone, and sold 9.5 million megawatt-hours of electricity in Colorado in 2012, as well as serving 56 Colorado counties, with extensive high-voltage transmission lines across Colorado, Complainants conclude that the State of Colorado can and does have a particularly strong interest in determining whether Tri-State's rates are discriminatory.

29. While Tri-State pointed out prior Commission decisions for the proposition that the Commission has a significant history of demurring on jurisdiction over Tri-State's rates, Complainants point out that "no one has ever before squarely asked the Commission to assert its statutory jurisdiction over Tri-State's rates or rate design." Nonetheless, Complainants also note that the Commission has asserted jurisdiction over Tri-State in several other contexts. As for the prior Commission decisions cited by Tri-State, Complainants argue that those decisions are inapplicable to the matter at hand and further, the Commission is not bound by *stare decisis* and may depart from prior decisions, when circumstances require.

30. In response to Tri-State's argument that under Colorado Public Utilities Law, G&Ts are not regulated by the Commission, Complainants take the position that the statutes cited by Tri-State, §§ 40-2-112 and 40-7-113.5, C.R.S., are inapplicable since neither deals with the Commission's regulation of a G&T's rates. Complainants assert that Tri-State fails to provide specific statutory support for its position because there is none.

31. Complainants argue that their assertion that Tri-State has violated Colorado law in the manner in which it implemented the A-37 rate states a claim upon which relief can be granted. Although Tri-State insists that it has not violated § 40-3-103, C.R.S. (implemented through Rule 3108) which requires utilities to file their tariffs with the Commission, Complainants find Tri-State's position "strained." It is Complainants' position that the statute does not limit the obligation to only retail rates, but rather requires every public utility to file its rates with the Commission. Consequently, it appears to Complainants that Tri-State is attempting to create an ambiguity where none exists.[5]

32. Regarding Tri-State's contention that it has not violated §§ 40-3-101, 40-3-104, 40-3-106(1), 40-3-111(1), or 40-6-111(4), C.R.S., Complainants again call attention to the specific language of those statutes which indicates that each statute is applicable to every public utility including Tri-State.

33. Complainants also address Tri-State's claim that Commission regulation of its wholesale rates would interfere with Tri-Sate's wholesale electric service contracts with its members. Complainants contend that the Complaint does not involve a contract dispute. Rather, the issue is whether the A-37 rate violates Public Utilities Law prohibiting discriminatory rates. Complainants argue that parties cannot privately contract to abrogate statutory requirements or contravene public policy. As such, the wholesale electric service contracts have no bearing on whether the A-37 rate is discriminatory. Complainants characterize Tri-State's claim that this matter is really a contractual dispute as defenses to the Complainants' claims.

[5] In addition, Complainants note Commission Rule 1210(a)(I) which requires "[a]ll utilities, unless specifically exempted by the Commission" to have current tariffs for their jurisdictional services on file.

34. As for the standing of the Industrial Complainants, Complainants disagree with Tri-State that they have no standing in this proceeding since, as customers of the member systems, they pay retail rates to the member systems rather than Tri-State's wholesale rates, and as such suffer no injury-in-fact. Complainants take the position that pursuant to § 40-6-108(1)(d), C.R.S., the Commission, in its discretion, may entertain a complaint in the absence of direct harm to a complainant. Tri-State's position is belied by the fact that once its costs are incurred by the member systems, there is little that can be done to stop those costs from being passed along to the retail consumers, according to the Complainants, or a member system could risk non-recovery if the member's actual usage does not match the assumptions used in designing wholesale rates. Further, the long term power supply contract between Tri-State and its member systems does not give those system members a viable alternative from whom to purchase their power supply. Complainants also assert that the Industrial Complainants have a legally protected interest to prevent unjust and unreasonable and preferential charges, since those rates are passed through to the retail consumers.

35. In the alternative, even if the Commission finds that the Industrial Complainants lack standing as Complainants on their own, then the Industrial Complainants could move forward with the Complaint as intervenors in this proceeding because the proceeding would substantially affect their pecuniary or tangible interests. The Industrial Complainants meet this standard and the difference between a "complainant" and an "intervenor" in this context is minimal in terms of how the case will proceed.

36. Finally, Complainants address Tri-State's claim that the member systems lack standing as to Claims Three and Four because the complaint was signed by counsel for the three cooperatives rather than the 25 member systems as it argues is required by § 40-6-108(1)(b),

C.R.S. Complainants point out that there are only 18 member systems in Tri-State's Colorado system leading to the conclusion that Tri-State's interpretation that the complaint must be signed by 25 member-systems is that the statute is a nullity, leading to an illogical result contrary to the well-recognized analysis of statutory construction.

37. Complainants take the position that § 40-6-108(1)(b), C.R.S., must be read in conjunction with § 40-6-111(4)(a), C.R.S., which reveals that the legislature intended to give members of customers of cooperative electric associations added protection by easing the requirement to challenge a utility's rate increase.[6] Based on its analysis, Complainants conclude that the only rational reading of § 40-6-108(1)(b), C.R.S., is that the Complainant member systems have standing to bring this Complaint because they represent more than 25 end use customers.[7]

4. Decision on Limited Evidentiary Hearing

38. Because of the nature and extent of the disputed facts regarding the issue of Commission jurisdiction in this complaint proceeding, on May 16, 2013 Interim Decision No. R13-0581-I was issued to hold a limited evidentiary hearing on the disputed facts regarding Tri-State's Motion to Dismiss. In that decision, the ALJ found it appropriate to conduct a limited evidentiary hearing because the jurisdictional facts in this proceeding were in dispute, because the determination of jurisdiction for the Commission to hear this Complaint could not be determined on the face of the pleadings.[8]

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[6] *Citing, Colo.-Ute Elec. Ass'n v. Pub. Utils. Comm'n*, 760 P.2d 627, 637 (Colo. 1988).

[7] In the event it is found that Complainants lack standing to bring one or more of the claims raised, they urge the Commission to begin an investigation on its own motion to investigate whether the A-37 rate violates Colorado Law.

[8] *Citing, Trinity Broadcasting of Denver, Inc. v. City of* Westminster, 848, P.2d 916, 925 (Colo. 1993) (citations omitted); and *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

39. A procedural schedule was adopted by Interim Decision No. R13-0648-I which was issued May 31, 2013, which set deadlines for the filing of direct, answer, and rebuttal testimony, and a limited evidentiary hearing was scheduled for July 29 through 31, 2013. A discovery schedule was also adopted by the Interim Decision.

40. In conformance with the procedural schedule, Complainants filed the direct testimony and exhibits of Dr. Martin J. Blake, a consultant and former commissioner of the New Mexico Public Regulatory Commission.

41. Tri-State filed the answer testimony and exhibits of: Mr. Micheal S. McInnes, Senior Vice President of Production for Tri-State; Mr. Daniel T. Walter, Senior Manager for Energy Markets for Tri-State; Mr. Robert W. Wolaver, Senior Manager of Energy Resources for Tri-State; Mr. James P. Spiers, Senior Vice President of Business Strategy/Chief Technology Officer for Tri-State; Mr. Daniel M. Walker, a financial advisor and consultant with G&T cooperative experience; Mr. John P. Corrigan, a utilities management consultant; and, Dr. Joseph P. Kalt a professor from the Kennedy School of Government, Harvard University.

42. Complainants filed the rebuttal testimony and exhibits of: Mr. Kevin C. Higgins, a consultant specializing in economic and policy analysis applicable to energy production, transportation, and consumption; Dr. Martin J. Blake; and, Mr. Michael P. Gorman, a public utility regulation consultant.

43. At the scheduled date and time, the limited evidentiary hearing was convened. Appearances were entered for Complainants on behalf of Industrial Complainants including BP, Encana, Enterprise, and Exxon, as well as White River, Empire, La Plata, and Kinder Morgan CO_2 Company. Appearances were also entered on behalf of Respondent Tri-State.

44. During the course of the hearing 74 hearing exhibits were either entered into evidence or administrative notice was taken. Those exhibits offered and entered into evidence include Hearing Exhibit Nos. 1 through 11, 27, 29 through 47, 48 through 57, 59 through 61, 64, 65, and 67 through 82. Administrative notice was taken of Hearing Exhibit Nos. 12 through 22.

45. On August 16, 2013, Complainants and Respondent filed their respective Closing Statements of Position.

II. FINDINGS

A. Colorado Public Utilities Law

46. The narrow issue[9] to be determined here is whether the Commission has subject matter jurisdiction to hear the Formal Complaint. The examination of the issue and attendant sub-issues begins with an analysis of the Colorado Public Utilities Law.[10] Complainants' position is that the Commission has subject matter jurisdiction over the Complaint under Colorado law. Tri-State, while conceding that it is indeed a public utility under Colorado law, nevertheless argues that the Commission lacks statutory rate jurisdiction over Tri-State's wholesale rates, and § 40-7-111, C.R.S., precludes that rate jurisdiction.

47. A discussion of the Commission's jurisdictional sphere necessarily begins with Article XXV of the Colorado Constitution which states in relevant part:

> ... all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility,

[9] The term "narrow issue" may be somewhat of a misnomer. While the issue is narrow, the analysis is broad and requires an examination of Colorado Public Utilities Law, the Rural Electrification Act (REA), the Federal Power Act (FPA), and the Commerce Clause.

[10] Indeed, if no state authority exists for Commission jurisdiction over the Complaint, the analysis concludes with dismissal of the Complaint which vitiates the need to delve deeper into the federal issues surrounding Commission jurisdiction.

> as presently or may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

48. Pursuant to § 40-3-102, C.R.S., the legislature has vested the authority contained in Article XXV to the Commission. That statute provided in relevant part as follows:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power …

It is evident that the General Assembly intended to place the primary duty and responsibility for the determination of just and reasonable utility rates with the Commission, and provided a complete procedural structure in the Colorado Public Utilities Law for the Commission to follow in discharging its function. *Pub. Utils. Comm'n v. Northwestern Water Corp.*, 451 P.2d 266 (1969).

49. The primary purpose of utility regulation is to ensure that the rates charged by utilities are not excessive or unjustly discriminatory. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981). As such, the Commission has been charged with the general responsibility to protect the public interest regarding utility rates and practices. *Consolidated Freightways Corp. v. Pub. Utils. Comm'n*, 406 P.2d 83 (1965). This public interest charge has been defined as protecting the interests of the general public from excessive or burdensome rates. *Pub. Utils. Comm'n. v. District Court*, 572 P.2d 233 (1974).[11] Unquestionably, the Commission

[11] Section 40-3-101(1), C.R.S. prohibits and finds unlawful "every unjust and unreasonable charge made, demanded, or received for such rate, fare, product or commodity or service …"

is endowed with broad regulatory and ratemaking authority and is required to discharge those duties when required to do so.

50. While Tri-State concedes it is a "public utility" under Colorado law,[12] it nonetheless disputes that it is subject to the Commission's rate jurisdiction. It challenges Complainants' claim that § 40-6-111, C.R.S., is applicable here since it can find no regulatory requirement under which Tri-State must file its rates with the Commission. Tri-State specifically points to § 40-6-111(1)(a), C.R.S., which requires that "... there [must be] filed with the [C]ommission any tariff or schedule stating any new or changed individual or joint rate ..." in order for the Commission to have jurisdiction either pursuant to a complaint or on its own initiative. According to Tri-State's reasoning, because § 40-6-111, C.R.S., requires that a tariff or schedule be filed, and because Commission regulations do not require it to file its rates or tariffs with the Commission (*see*, Rule 3000(c)), there can be no Commission jurisdiction over its rates.

51. Complainants, however, rely on § 40-6-111(4)(a), C.R.S., which states in relevant part:

> Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of section 40-3-106 (1) or
> section 40-3-111

According to Complainants, this statutory provision unequivocally expresses a state interest in investigating rates of a G&T that are claimed to be discriminatory or improper.

52. The canons of statutory construction have been cited and re-cited so often as to be they are nearly axiomatic. Statutes concerning the same subject matter are to be read together as

[12] Hrg. Exh. No. 3 – Answer Testimony and Exhibits of Tri-State witness Daniel T. Walker.

much as possible in order to give effect to the legislative intent and it must be presumed that the general assembly intended a just and reasonable result. *See*, § 2-4-201, C.R.S.; *Avicomm, Inc., v. Colo. Pub. Utils. Comm'n.*, 955 P.2d 1023 (Colo. 1998). Statutes should be interpreted, if possible, to harmonize and give meaning to other potentially conflicting statutes. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987). A statute must be construed to further the legislative intent evidenced by the entire statutory scheme. *Martinez v. Cont'l. Enters.*, 730 P.2d 308 (Colo. 1986). When construing statutes, determination and effect must be given to the intent of the legislature, and a statutory construction must be adopted that best effectuates the purposes of the legislative scheme. *City and County of Denver v. Gonzales*, 17 P.3d 137 (Colo. 2001).

53. Section 40-6-111(4)(a), C.R.S., was crafted by the legislature in a manner to make the Commission's suspension of rate powers inapplicable to cooperative electric associations, while nevertheless leaving those public utilities subject to the other provisions of not only that section, but also the relevant rate jurisdiction provisions of the Public Utilities Law. *Colorado-Ute Electric Association, Inc., v. Pub. Utils. Comm'n*, 760 P.2d 627, 637 (1988). The statute expressly provides that subsection (4) is not to be construed to exempt cooperative electric associations from any other provision of § 40-6-111, C.R.S., including conducting a hearing regarding the propriety of a newly filed rate or changed rate upon complaint or on the Commission's own initiative. *Id.* (referring to §§ 40-6-111(1) and (2)(a), C.R.S.). Therefore, cooperative electric associations are exempt only from the power of the Commission to suspend a tariff, which provides a harmonious and consistent effect to the statute's provisions. *Id.*

54. The language of § 40-6-111(4)(a), C.R.S., precludes cooperative electric associations from establishing, charging, or collecting discriminatory or preferential rates which

would not only violate § 40-6-111, C.R.S., but also § 40-3-106(1), C.R.S. Notably, § 40-3-106(1), C.R.S., does not contain a requirement that a rate considered under that section must have been previously filed with the Commission. But most importantly, it is apparent that the legislature provided a clear avenue for members or customers of electric cooperative associations to seek relief for any rate violations pursuant to either of those two statutory provisions.

55. Further, incorporating §§ 40-6-108(1)(a) and (b), C.R.S. (the Commission's primary complaint procedure statute) into the interpretation of Commission rate jurisdiction with §§ 40-6-111(1) and (4)(a), C.R.S., it becomes apparent that not only are these provisions consistent with each other, but the last sentence of § 40-6-111(4)(a), C.R.S., in effect lessens the requirements of § 40-6-108(1)(b), C.R.S., which requires that a complaint as to the reasonableness of any rates or charges of an electric utility must be signed by not less than 25 customers or prospective customers of the public utility, which in turn, as stated *supra*, eases the regulatory burden on cooperative electric associations. *Colorado-Ute Electric Association, Inc.* at 637. This interpretation is further augmented by § 40-6-110, C.R.S., which provides that "[a]ny public utility has a right to complain on **any grounds** upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases." (Emphasis added).

56. Reading those statutes together, along with § 40-3-102, C.R.S., nothing can be ascertained which would diminish any of the Commission's jurisdictional powers under Public Utilities Law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates

as applicable to Tri-State.[13] Consequently, it is found that the Public Utilities Law and specifically the statutory provisions cited above (and harmonized) provide the Commission with state jurisdiction over Tri-State's rates. Based on those findings, it is also held that Complainants have standing to bring Claim Three based on alleged violations of § 40-3-101 and § 40-3-111, C.R.S., and Claim Four based on alleged violations of § 40-3-106(1) and § 40-3-111(1), C.R.S., of the Complaint.

57. Tri-State takes the position that the Commission has recognized for nearly 40 years that it does not exercise ratemaking jurisdiction over Tri-State. In support of that contention, Tri-State cites several Commission decisions which purport to establish the Commission's policy regarding Tri-State's rates. It also points out that the Commission has chosen not to promulgate rules requiring Tri-State to file its rates with the Commission and in fact has promulgated rules excluding cooperative electric G&T associations from the application of its tariff and rate rules.

58. Complainants, however, argue that none of the cases cited by Tri-State address the specific question of whether the Commission has jurisdictional authority to hear a complaint brought by Tri-State member systems alleging Tri-State's rates are discriminatory. Complainants maintain that statements in prior Commission decisions regarding the scope of Commission rate regulation over Tri-State are more likely an indication that the Commission acknowledges that it regulates Tri-State very differently from the investor-owned utilities (IOUs) in the state. Complainants assert that there is no basis to read into any of those Commission decisions, an

[13] Section 40-6-111(4)(a), C.R.S., provides that the Commission shall, upon complaint filed by any member or customer of a cooperative electric association, determine whether the rate or charge in question is contrary to this section, § 40-3-106(1), or § 40-3-111, C.R.S.

affirmative conclusion that the Commission has disclaimed jurisdiction to hear a lawfully filed complaint that Tri-State's rates are discriminatory.

59. Due to the legislative nature of ratemaking, the Commission is not bound by *stare decisis*. *Colo.-Ute* at 639. Nonetheless, Commission prior decisions are entitled to deference and are to be accorded great weight. *B & M Service, Inc. v. Pub. Utils. Comm'n.*, 429 P.2d 293, 295 (Colo. 1967) (*citations omitted*) (finding that although past Commission decisions should be given great weight, the Commission could change its position and the mere fact that it is inconsistent with at least one prior decision does not render it arbitrary, unlawful, unreasonable, or capricious).

60. A review of the decisions cited by Tri-State reveals that each addresses a discrete issue unrelated to Commission jurisdiction to hear a complaint regarding Tri-State's rates. For example, in Decision No. 86499 issued March 18, 1975, the Commission considered an application by Tri-State to issue securities for the construction of infrastructure. There, the Commission relied on the bright line test articulated in *Pub. Utils. Comm'n. of Rhode Island v. Attleboro Steam and Electric*, 273 U.S. 83 (1926) in determining it did not have authority to approve the issuance of securities sought by Tri-State.

61. In Decision No. C02-793, Proceeding No. 02R-137E issued July 22, 2002, the issue involved proposed amendments to the Commission's Electric Integrated Resource Planning Rules. There, the Commission made a conclusory statement without analysis that it did not have rate authority over Tri-State so it was inappropriate to subject it to the competitive resource acquisition requirements.

62. In Decision No. C06-0657, Proceeding No. 05M-375E issued June 6, 2006, Pubic Service Company of Colorado's Petition to Open a Docket to Consider Revisions to the

Commission's Electric Least Cost Resource Planning Rules, the Commission, relying on the statement in Decision No. C02-793 again stated that it did not have rate authority over Tri-State. Again, the statement was without supporting analysis as to the Commission's reasoning.

63. In Decision No. R99-891, Proceeding No. 99A-196E issued August 12, 1999, the ALJ found that the Commission should not interfere with a merger of Tri-State with Plains Electric Generation and Transmission Cooperative located in New Mexico. The ALJ determined that the transaction was in interstate commerce and therefore beyond the jurisdiction of the Commission. The ALJ also distinguished *Arkansas Electric Cooperative v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) from that particular transaction in that Tri-State was not similar in basic operation to the Arkansas utility, and anything done in the merger application would not be incidental to interstate commerce, but would directly interfere with it.[14]

64. The prior Commission cases cited by Tri-State clearly deal with matters other than whether a member system may bring a complaint based on Tri-State's rates to the Commission. As indicated *supra*, the various issues addressed by the Commission did not squarely address the matter at hand.[15] That the Commission determined that it did not have jurisdiction over Tri-State's rates appear to be mostly incidental to its ultimate findings on other issues in those proceedings. Consequently, it is not necessary to use those prior Commission decisions as precedent in this matter, and failing to do so does not render this decision arbitrary, unlawful,

[14] While Tri-State uses these prior Commission decisions as support for its position that the Commission does not possess jurisdiction to hear this Complaint, regarding Decision No. 86499 and in Proceeding No. 99A-196E, Tri-State must have believed the Commission did have jurisdiction to decide its application to issue securities and to approve its application to merge with Plains Electric Generation and Transmission Cooperative located in New Mexico, or it would not have sought Commission approval in the first instance.

[15] *See*, Hearing Transcript, Vol. 2, 7/30/13, 200:4 – 201:24, Spiers cross-examination

unreasonable, or capricious. Further, the outcome of those prior Commission decisions does not affect the analysis above of Commission jurisdiction based on Colorado Public Utilities Law.

65. The finding regarding Commission jurisdiction pursuant to Colorado Public Utilities Law is buttressed by the fact that federal rate regulation of Tri-State leaves a significant regulatory gap in which the Commission is required and is permitted to assert jurisdiction.

66. It is understood that the Federal Energy Regulatory Commission (FERC) regulates the interstate wholesale electricity market through rate regulations pursuant to the Federal Power Act (FPA) which requires utilities to charge "just and reasonable rates." *16 U.S.C. § 824d(a)*. The FPA granted FERC the exclusive authority to enforce this provision by regulating the rates, terms, and conditions governing the interstate transmission and sale of wholesale energy in interstate commerce. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). However, while the FPA generally grants FERC exclusive jurisdiction over the regulation of wholesale power, FERC lacks jurisdiction over utilities that are regulated by the Rural Electrification Administration (REA) under the Rural Electrification Act (RE Act), the predecessor agency to the Rural Utilities Service (RUS), the agency charged with promoting rural electrification by providing loans for infrastructure development. *Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Association, Inc.*, 707 F.3d 883 (7th Cir. 2013). Importantly, different from FERC, the RUS does not have exclusive jurisdiction over the regulation of wholesale electric rates, which provides the states with a jurisdictional avenue to regulate wholesale power companies which are financed by the RUS. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983).

67. The FPA empowered FERC to regulate rates and services for interstate transmission and wholesale sales by entities not specifically exempted, while leaving local

distribution and purely intrastate transmission to state regulators. *16 U.S. C. § 824(b).* FERC's broad authority over interstate transmission and sales is apparent. However, FERC has relinquished jurisdiction when an electric cooperative receives financing under the RE Act. *16 U.S.C. 824(f)* as is the case with Tri-State.[16]

68. As a result, Tri-State's rates are regulated by the RUS pursuant to 7 *Code of Federal Regulations* (CFR) 1717.300, *et seq.*[17] Because the RUS makes and guarantees loans to rural electric cooperatives such as Tri-State, it requires them to "charge rates for the sale of electric power and energy which are sufficient to pay the principal and interest on loans made or guaranteed by RUS in a timely manner and to meet the requirements of the RUS wholesale power contract and other RUS documents." *Id.* at 301(b). Further, the RUS recognizes that since it does not require that cooperative electric utilities that have loans or guarantees through the RUS to ensure that their rates are just and reasonable, there is room for state rate regulation of wholesale rates. As such, the RUS will only pre-empt a state's jurisdiction over rates where the RUS Administrator "has determined that such [state] jurisdiction has compromised Federal interests, including … the ability of the borrower to repay its secured loans in accordance with the terms of the RUS documents." *Id.* at 301(b) through (e).

69. The RE Act clearly does not expressly empower or authorize the Administrator Secretary to pre-empt the jurisdiction of a state regulatory agency or to regulate the rates of a power supply borrower except in narrow circumstances. Nothing exists in the RE Act that expressly pre-empts state rate regulation of a power cooperative financed by the REA. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 385-386. Rather, "the REA is

[16] *See*, Tri-State's Motion to Dismiss Formal Complaint, pp. 10-11.
[17] Hearing Exhibit No. 54.

a lending agency rather than a classic public utility regulatory body in the mold of either FERC or the Arkansas PSC." *Id.*

70. In reviewing the Congressional history of the RE Act, the Court noted that "the legislative history … makes abundantly clear … that although the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes." *Id.* at 386 (Congressional history omitted).

71. Given the lack of federal oversight over the wholesale rates of Tri-State, it is incumbent upon the Commission to utilize its authorized jurisdiction to investigate claims that the company's rates may be unjust, unreasonable, or discriminatory.

72. Despite the finding of jurisdiction to hear this Complaint under Public Utilities Law, as Tri-State correctly observes, § 40-7-111, C.R.S., requires, in relevant part, that "[n]one of the provisions of articles 1 to 7 of [title 40] except when specifically so stated, shall apply or be construed to apply to commerce among the several states, except insofar as the same may be permitted under the provisions of the constitution of the United States and the acts of congress."

B. Commerce Clause

73. As indicated *supra*, the U.S. Constitute reserves to Congress the power to regulate commerce among the several states. The dormant Commerce Clause applies when a state, in the absence of any pre-empting federal action, passes a law or engages in conduct which interferes with interstate commerce.

74. Tri-State argues that regulation of its wholesale rates will have the "practical effect" of controlling conduct beyond Colorado's borders so that any Commission regulation of its rates would be a *per se* violation of the Commerce Clause. Tri-State argues that a *per se*

violation of the Commerce Clause occurs if a state's actions have the "practical effect" of controlling conduct beyond the state's borders. *Citing, American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2nd Cir. 2003).

75. Complainants, on the other hand, argue that Tri-State cannot use the Commerce Clause to pre-empt Colorado law and Commission jurisdiction over the Complaint because the federal government, exercising its power under the Commerce Clause, specifically reserved for the states, rate authority over cooperative electric associations such as Tri-State. As a result, Complainants argue that a balancing test must be employed to determine whether any legitimate state interests are present which outweigh any burden on interstate commerce.

76. A *per se* violation of the Commerce Clause involves a state law which overtly blocks the flow of interstate commerce at a state's border. *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 623-24 (1978). This is the clearest example of state legislation which effects simple economic protectionism. *Id.* However, "where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach. *Id.*, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Therefore, a crucial inquiry is to determine whether the state action is basically a protectionist measure, or whether it can be fairly viewed as a law directed to legitimate local concerns, with

effects upon interstate commerce that are only incidental. *City of Philadelphia*, 437 U.S. at 625 *supra*.

77. It is undisputed that Tri-State operates in interstate commerce. It has member systems to which it provides wholesale electricity sales in four states including Wyoming, Colorado, New Mexico, and Nebraska. (Hrg. Exh. 2 Answer Testimony and exhibits of Michael S. McInnes). Those member systems in turn serve approximately 1.5 million consumers. (Hrg. Exh 6 Answer Testimony and exhibits of Daniel M. Walker). Tri-State's member systems provide retail electric service extending into Arizona, Montana, and Utah. *Id.*

78. Tri-State's generation resources including baseload, intermediate, and peaking resources located in Arizona, Colorado, New Mexico, and Wyoming. (Hrg. Exh. 3 Answer Testimony and exhibits of Daniel T. Walter) Tri-State also purchases and sells large quantities of power to and from other entities located throughout the western United States which is transmitted through both the Western and Eastern Interconnections, including the Western Area Power Administration, Public Service Company of Colorado, the Salt River Project, PacifiCorp, Basin Electric, Shell Energy North America, and several renewable energy companies. (Hrg. Exh. 8 Answer Testimony and exhibits of Joseph P. Kalt)

79. Based on that evidence and referring to *New York v. Federal Energy Regulation Commission*, 535 U.S. 1 (2002), which finds that "transmissions on the interconnected national grids constitute transmissions in interstate commerce," *Id.* at 16 since Tri-State is engaged in interstate commerce, it argues that any attempt at rate regulation by the Commission will result in a *per se* violation of the Commerce Clause.

80. It is well-established that with the exception of Hawaii, Alaska, and Texas, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is

constantly moving in interstate commerce." *Id.* at 7. *See also, FPC v. Florida Power & Light Co.* 404 U.S. 453, 469 (1972). However, this is true for not only Tri-State, but also for the IOUs in Colorado as well. Despite the understanding that the electricity generated by those IOUs moves in interstate commerce the instant electrons are injected into the grid, they are nonetheless not so intertwined in interstate commerce as to exempt them from Commission jurisdiction over their retail rates.

81. Tri-State's argument that given the interstate character of its cooperative system any Commission assertion of rate authority will result in a *per se* violation is less than convincing given the fact that Congress made way for state regulation of Tri-State's wholesale rates. Indeed, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985). (Addressing dormant Commerce Clause question whether an individual state acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out-of-state holding companies).

82. As was discussed *supra*, FERC has ceded jurisdiction over rural cooperative electric associations such as Tri-State to the RUS because Tri-State obtains loans or receives guarantees for certain loans from the RUS (16 USC § 824(f)). In turn, the RUS has clearly made accommodations for state regulation of the wholesale rates of those cooperative electric associations such as Tri-State (7 CFR § 1717.300, *et seq.*) It is apparent then that state jurisdiction over a cooperative such as Tri-State is permitted by federal law. Since the RUS has made room for regulation of Tri-State's rates by this Commission, it appears that there can be no attack on that authorization pursuant to the Commerce Clause.

83. Tri-State attempts to demonstrate that any rate regulation by the Commission would necessarily require full rate regulation including the filing of its rates and a hearing on the rates' propriety. As a result, Tri-State argues that because its load and resources must always be in balance, and because its current interstate system allows load and resources to balance across the entirety of the Tri-State system, any rate regulation would likely create a situation where it cannot schedule New Mexico and Wyoming generation resources throughout its interstate system to serve load, for example, in Colorado.

84. In addition, Tri-State maintains that a revision to its A-37 rates would change power consumption behavior of its member systems in Colorado so that its integrated multi-state system would be dispatched differently and less optimally across all Tri-State's service area. Tri-State goes on to state that Colorado, New Mexico, and Wyoming have competing interests in ensuring that wholesale rates charged in their respective states are the lowest in the Tri-State system, which could lead to a disallowance of full cost recovery for Tri-State.

85. Tri-State's concerns regarding the full rate regulation it assumes would be asserted by the Commission here are speculative at best. Tri-State provides no evidence to the record that this has occurred in the past. Additionally, Tri-State witness Mr. Corrigan testified on cross-examination that Tri-State's system would actually not be dispatched differently if there is a cost-based differential based on two separate rates in two states:

> Q: Let me start off with a new question here. So are you agreeing with me that if there is a cost-based differential driving the fact that there are two rates, that regardless of the fact that there are two rates, Tri-State will still operate the integrated system as a whole so as to minimize the system costs to the membership as a whole; is that correct?
>
> A: That is correct.

Tri-State also argues that the Commission could not assert limited regulation as requested by Complainants, as it must assert its full regulatory authority when required. However, as the court found in *Colorado-Ute Elec. Ass'n, Inc.* the determination as to how to regulate rates lies squarely within the discretion of the Commission.

86. As a result, it is found that the Commerce Clause issues raised by Tri-State are not available to it since Congress has provided an avenue for state regulation over Tri-State's wholesale interstate rates. Notwithstanding Tri-State's claims of full rate regulation, the question here is merely one of Commission jurisdiction to hear the Complaint. Because state public utilities law provides for Commission jurisdiction over Tri-State's wholesale rates, and because there is no violation of the Commerce Clause by asserting that jurisdiction, it is found that the Commission has jurisdiction to hear this Complaint.

87. Tri-State cites several decisions for the proposition that Commission jurisdiction here would result in a *per se* invalidity under the Commerce Clause even without a direct burden on interstate commerce if a state's actions have the "practical effect" of controlling conduct beyond the state's borders.[18] However, it does not appear that in any of those cited cases, a federal statute or regulation existed which provided the underlying local regulatory agency with authority to regulate rates as exists here. In addition, as explained *supra*, Tri-State's assumptions regarding the degree to which the Commission may assert rate regulation is merely speculative and premature at this point.

[18] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); *Healy v. Beer Institute*, 491 U.S. 324 (1989); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *TeleTech Sys., Inc. v. Barbour*, 866 F. Supp. 2d 571 (S.D. Miss. 2011).

88. Further, under an analysis of the balancing test articulated in *Pike v. Bruce Church*, 397 U.S. at 142, when "a statute regulates even-handedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." There is simply no concrete evidence to determine that Commission jurisdiction to hear the Complaint will be excessive in relation to ensuring that Tri-State's rates are just, reasonable, and non-discriminatory. The bulk of the testimony offered by Tri-State is based on Tri-State's assumption that any regulation by the Commission would necessarily be full rate regulation similar to IOU rate regulation in Colorado.

89. However, as indicated *supra*, there is no reason to believe that the Commission would adopt a policy to rate regulate Tri-State in that manner. Further, much weight must be given to the fact that the RUS has provided a place for Commission jurisdiction over Tri-State's rates, recognizing that states have an important public interest regarding rate regulation. This weight clearly tips the *Pike* balancing test towards finding that the existence of those putative local benefits outweigh any burden on interstate commerce, which as also indicated *supra*, is at this point speculative at best.

C. Standing of Industrial Complainants

90. Tri-State seeks to dismiss the Industrial Complainants from the Complaint. Tri-State argues that it exclusively provides wholesale service to its member systems that in turn provide retail electric service to their Industrial Complainant customers. In addition, Tri-State states that the notice of rate change applied only to the wholesale rates charged to its member systems, and those member systems set their own rates independently of Tri-State and provide such notice to their own customers, such as the Industrial Complainants. Tri-State concludes that

the Industrial Complainants are complaining about the retail rates charged by their respective member systems which are not before the Commission in this proceeding. Therefore, the Industrial Complainants should be dismissed from this proceeding since their true complaint lies with the retail rates they are being charged by the member systems which provide retail electric service to them.

91. Complainants argue that all member-customers must purchase electricity from the member systems in whose territory the customer resides. Consequently, any rate increase imposed by Tri-State will be passed on to the member-customers, including the Industrial Complainants, who will in turn, be required to pay the discriminatory and unjust rate. In the alternative, Complainants assert that even if the Industrial Complainants lack standing, if the cooperative Complainants have standing, then the Complaint could move forward with the Industrial Complainants as intervening parties.

92. As typically found by the Commission in previous standing questions, standing is a threshold question of law. *Board of County Commissioners of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1122 (Colo. App. 2003).

93. A two-part test is applied to resolve the issue of standing. The first prong of the test is whether the party seeking relief alleges an injury-in-fact. The second prong of the test is whether the alleged injury is to a legally protected or cognizable interest. *Douglas County Board of Commissioners v. Pub. Utils. Comm'n*, 829 P.2d 1301, 1309 (Colo. 1992). The Industrial Complainants bear the burden of proof that they have standing to participate as Complainants in this case.

94. Section 40-6-108(1)(d), C.R.S., provides that the Commission "is not required to dismiss any complaint because of the absence of direct damage to the complainant."

This provision directly relates to the first prong of the standing test and permits the Commission, should it choose, to hear a complaint even in the absence of direct harm to a complainant. The Industrial Complainants must also establish they have a legally protected or cognizable interest in the subject matter of the proceeding.

95. Here, the Industrial Complainants argue that the wholesale rates in fact will be passed on to them since the member systems must closely mirror wholesale rates to both ensure they fully recover their costs and do not create inappropriate cross-subsidies between their various member-consumers. Further, due to the long-term power supply contract in place between Tri-State and its member systems, Tri-State's members have no other alternative from whom to purchase their power supply and cannot decide to purchase their power supply elsewhere.

96. The first prong of the standing test is met by virtue of § 40-6-108(1)(d), C.R.S. The second prong of the test relating to a legally protected or cognizable interest is met as well. Certainly, the wholesale rates charged to the member systems are passed on to Tri-State's member system's customers, including the Industrial Complainants. Because it is found that the rate increases constitute a cognizable interest, Industrial Complainants have standing as complainants in this proceeding.

III. ORDER

A. It Is Ordered That:

1. The Motion of Tri-State Transmission and Generation Association to Dismiss Formal Complaint is denied consistent with the discussion above.

2. BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Power and Gas Services Inc., on behalf of

ExxonMobil Production Company, a division of ExxonMobil Corporation; and Kinder Morgan CO_2 Company, L.P. have standing as Complainants in this Complaint proceeding consistent with the discussion above.

3. This Interim Decision is certified as immediately appealable to the Commission *en banc* pursuant to 4 *Code of Colorado Regulations* 723-1-1502(d).

4. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director

Taos electric co-op says Tri-State offer 'insulting'

Kit Carson Electric Cooperative is officially seeking another power supplier after being told it would cost $137 million to get out of its existing contract.

Posted Wednesday, January 14, 2015 7:15 pm

J.R. Logan

Kit Carson Electric Cooperative is officially seeking another power supplier after being told it would cost $137 million to get out of its existing contract.

Co-op CEO Luis Reyes called the exit proposal from Denver-based Tri-State Generation and Transmission "insulting," and the co-op has pledged to move ahead with four new solar projects that Tri-State may oppose.

The co-op buys wholesale electricity from Tri-State, but it has been at odds with that company for years over a slew of issues. The co-op has accused Tri-State of arbitrary rate increases and has long denounced a clause in its supplier contract that limits the co-op's development of renewable energy to 5 percent of its energy consumption.

The co-op successfully blocked a rate increase from Tri-State that was originally proposed in 2012. As part of that effort, Kit Carson and three other New Mexico co-ops convinced state regulators to look into Tri-State's rate structure. In response, Tri-State filed a federal lawsuit arguing it was beyond the jurisdiction of state regulators, and all sides were preparing for what looked like a long and expensive battle over electric rates.

But last fall, Tri-State and several New Mexico co-ops agreed to begin closed-door negotiations to come up with a "global settlement" that would bypass regulators and the courts while resolving the outstanding issues.

To get the negotiations off the ground, the New Mexico co-ops served by Tri-State agreed to a temporary rate increase that would give Tri-State an additional $7 million a year in revenues. The temporary rate increase is set to expire at the end of 2015. In turn, Tri-State promised to give the co-ops terms by which they could get out of their contracts.

So far, however, the success of the negotiations appears limited.

Under the agreement to enter negotiations, Tri-State was obliged to provide a "good faith" exit offer to any co-op that asked to get out of its contract. Kit Carson's contract with Tri-State does not expire until 2040, and it asked for a proposal to find a new supplier.

All parties involved in the negotiations are limited to what they can say publicly by non-disclosure agreements. But co-op CEO Reyes said the proposal received last month was a "non-starter." He said the terms of Tri-State's exit offer would require Kit Carson to pay Tri-State $137 million to cancel the contract and allow Kit Carson to find another power provider.

"The proposal they gave us was disingenuous and disappointing," Reyes said. "It was really insulting."

In an apparent reaction to that insult, the co-op board voted at the end of December to move forward on four solar projects in Peñasco, Tres Piedras, Angel Fire and Eagle Nest. Combined, the energy produced at those arrays will likely push the co-op to the edge of its contractual limit on renewable energy production, and past a limit established by a separate Tri-State policy.

"We're going to build [the arrays]," Reyes said. "Our members want it, and we're not going to let [Tri-State] push the co-op around."

But a spokesman for Tri-State said the offer was legitimate and it was willing to stick with the talks.

"All of our New Mexico members have received a good faith proposal and we continue to work collaboratively towards a settlement," said Lee Boughey in an email to The Taos News. "We are all in the early stages of a complex process that Tri-State is dedicated to see through."

Reyes said the co-op is willing to stick with the negotiations for a couple months to see if it can make any progress. In the meantime, the temporary rate increase will remain in effect and co-op customers will continue paying more for power. The higher rates add about $1.10 a month to the average residential customer's bill.

For that reason, Reyes said it was important to set "hard deadlines" this spring to either reach an agreement with Tri-State or ask regulators to step in and move ahead with an investigation of Tri-State's rates.

Reyes said the co-op has talked with other power suppliers, but details are still being discussed and no firm proposals or cost estimates are ready.

In 2013, the co-op bought more than $22 million worth of wholesale electricity from Tri-State.

The co-op has recently seen net margins of around $1 million a year, though they've fluctuated from year to year. All told, the co-op has about as much in total assets and Tri-State has asked for to end the contract.

Reyes said Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State's costs.

Tri-State used a similar methodology when five Nebraska co-ops asked to be release from their contracts and were told it would cost a total of $200 million. A lawsuit filed by the co-ops in federal court said the proposal was completely unreasonable and accused Tri-State of keeping them "captive in an increasingly intolerable situation that Tri-State simply refuses to acknowledge, let alone correct."

Despite those claims, a federal jury sided with Tri-State last June and did not find it guilty of on civil breach of contract charges.

If negotiations ultimately fail, Reyes said the co-op could ask a federal court to invalidate its contract with Tri-State. Reyes asserts Tri-State was disingenuous when the contracts were first signed because it agreed to a clause that would give state regulators authority to investigate rate hikes if three or more New Mexico co-ops protested the increase. When that happened for the first time a couple years ago, Tri-State immediately went to federal court and claimed the same provision was unconstitutional.

TRI-STATE Generation and Transmission Association, Inc.

Board of Directors Policy

Subject: REQUESTS FOR TRI-STATE INFORMATION			Policy No.: 406
Original Issue : 7-7-00	Last Revised: 3-2-16	Last Reviewed: 3-2-16	Page 5 of 7

EXHIBIT A to Board Policy 406

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
Westminster, Colorado

RESTRICTED INFORMATION OR DOCUMENTATION REQUEST FORM

NOTE: No information or documentation concerning Tri-State, its Member Systems, personnel, directors, agents, employees or operations shall be made available (except for Routine Information covered in Tri-State's Policy on Requests for Tri-State Information or Documentation) unless the requesting party satisfactorily fills out and executes this form, and unless the Tri-State Board of Directors authorizes the requested information or documentation to be made available to the person requesting the same.

REQUESTING PERSON'S IDENTIFICATION:

Name: Jasen Bronec, CEO, DMEA Telephone: (970) 240-1299

Address: 11925 6300 Road
Street

City/State/Zip: Montrose, Colorado 81401

STATE ***SPECIFICALLY*** WHAT INFORMATION OR DOCUMENTATION IS BEING REQUESTED:

1. The underlying model (e.g. spreadsheet or similar matrix) used to calculate the "Mark to Market" buyout methodology used in Tri-State's January 11, 2017 DMEA withdrawal discussions

2. The complete Long-Term Financial Forecast used in the January 11 "Mark to Market" buyout methodology.

3. The complete Integrated Resource Plan showing any capacity additions/changes and related capacity credits used in or relevant to the "Mark to Market" buyout methodology.

4. Other relevant assumptions, inputs, or data used in calculating Tri-State's January 11 "Mark to Market" buyout methodology.

, Chairman and President	Date: 3-2-16

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TRI-STATE Generation and Transmission Association, Inc.

Board of Directors Policy

Subject: REQUESTS FOR TRI-STATE INFORMATION			Policy No.: 406
Original Issue : 7-7-00	Last Revised: 3-2-16	Last Reviewed: 3-2-16	Page 6 of 7

EXHIBIT A to Board Policy 406, continued

STATE ***SPECIFICALLY*** WHY YOU WANT SUCH INFORMATION OR DOCUMENTATION AND FOR WHAT USE AND PURPOSE SAID INFORMATION OR DOCUMENTATION IS INTENDED AND WILL BE USED:

This modeling and input information will allow DMEA to meaningfully evaluate Tri-State's buyout calculation pursuant to Tri-State bylaws Section 3(a).

DMEA will hold this information in confidence pursuant to the parties' January 11, 2017 confidentiality agreement.

IF THIS REQUEST IS MADE ON BEHALF OF ANOTHER PERSON OR PERSONS OTHER THAN YOURSELF OR ON BEHALF OF, OR IN THE NAME OF, ANOTHER PERSON, FIRM, CORPORATION OR ASSOCIATION, PLEASE ATTACH AN ADDITIONAL PAGE STATING THE NAMES, BUSINESS, ADDRESSES, AND TELEPHONE NUMBERS OF SUCH PERSON(S), FIRM(S), OR ASSOCIATION(S).

IF YOU ARE REPRESENTED BY AN ATTORNEY AT LAW IN MAKING THIS REQUEST, PLEASE STATE SUCH ATTORNEY'S NAME, BUSINESS ADDRESS AND TELEPHONE NUMBER:

IT IS UNDERSTOOD AND AGREED THAT THE UNDERSIGNED WILL NOT USE, OR PERMIT OTHERS TO USE, THE REQUESTED INFORMATION OR DOCUMENTATION FOR A USE OR PURPOSE OTHER THAN THAT ABOVE STATED. IT IS ALSO UNDERSTOOD THAT THE UNDERSIGNED WILL BE CHARGED FOR TRI-STATE' S COSTS ACTUALLY INCURRED IN MAKING SUCH INFORMATION OR DOCUMENTATION AVAILABLE, AND IT IS HEREBY AGREED THAT THE UNDERSIGNED WILL PAY ALL SUCH COSTS, AS DETERMINED BY TRI-STATE, AT THE TIME THE INFORMATION OR DOCUMENTATION IS PROVIDED.

Date: May 17, 2017

(Signature)

, Chairman and President	Date: 3-2-16

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DMEA
A Touchstone Energy® Cooperative

April 24, 2018

Micheal McInnes, Chief Executive Officer
Tri-State Generation and Transmission Association, Inc.
1100 W. 116th Ave,
Westminster, CO 80234-2814

Re: Policy 406 Information Request

Dear Micheal:

Delta-Montrose Electric Association (DMEA) respectfully submits the attached request for information under Tri-State Board Policy 406.[1]

The request asks for materials relevant to the 2016 exit of Kit Carson Electric Cooperative from membership in Tri-State. This Kit Carson exit information and Tri-State's previous determination of "equitable" exit terms for Kit Carson under Section 3(a) of the Tri-State Bylaws are an important and relevant reference as DMEA moves toward its own equitable withdrawal from Tri-State.

As you also know, DMEA has previously requested this information orally and in writing, most recently in a March 30, 2018 written request to Tri-State's Senior Vice President, Brad Nebergall. Tri-State senior staff have discussed the request internally but have not produced the materials. DMEA hopes that by formalizing its request through this Policy 406 submission, it can obtain and evaluate the Kit Carson information and thereby facilitate and accelerate the parties' negotiations concerning DMEA's goal of equitably withdrawing from Tri-State.

In an April 13, 2018 letter, Kit Carson authorized Tri-State to share all Kit Carson withdrawal-related information with DMEA provided such information remains confidential. With regard to Kit Carson's request to maintain its withdrawal-related information in confidence, DMEA agrees to keep the requested information confidential pursuant to DMEA and Tri-State's January 11, 2017 confidentiality agreement.

Thank you in advance for your attention to this request. To the extent Tri-State declines to disclose Kit Carson-related exit information, DMEA respectfully requests that Tri-State inform DMEA under what circumstances it would be willing to produce such information.

Sincerely,

Jasen Bronec, CEO
Delta-Montrose Electric Association

/ Enclosure

[1] Please note that DMEA Board member Kyle Martinez, who also serves on Tri-State's Board of Directors, did not participate in any deliberations or decisions relating to this information request.

TRI-STATE Generation and Transmission Association, Inc.

Board of Directors Policy

Subject: REQUESTS FOR TRI-STATE INFORMATION			Policy No.: 406
Original Issue : 7-7-00	Last Revised: 3-2-16	Last Reviewed: 3-7-18	Page 5 of 7

EXHIBIT A to Board Policy 406

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
Westminster, Colorado

RESTRICTED INFORMATION OR DOCUMENTATION REQUEST FORM

NOTE: No information or documentation concerning Tri-State, its Member Systems, personnel, directors, agents, employees or operations shall be made available (except for Routine Information covered in Tri-State's Policy on Requests for Tri-State Information or Documentation) unless the requesting party satisfactorily fills out and executes this form, and unless the Tri-State Board of Directors authorizes the requested information or documentation to be made available to the person requesting the same.

REQUESTING PERSON'S IDENTIFICATION:

Name: Jasen Bronec Telephone: 877-687-3632

Address: 11925 6300 Road
Street

City/State/Zip: Montrose, CO 81401

STATE ***SPECIFICALLY*** WHAT INFORMATION OR DOCUMENTATION IS BEING REQUESTED:

See Attachment 1

_____, Chairman and President	Date: 3-7-18

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TRI-STATE Generation and Transmission Association, Inc.

Board of Directors Policy

Subject: REQUESTS FOR TRI-STATE INFORMATION			Policy No.: 406
Original Issue : 7-7-00	Last Revised: 3-2-16	Last Reviewed: 3-7-18	Page 6 of 7

EXHIBIT A to Board Policy 406, continued

STATE ***SPECIFICALLY*** WHY YOU WANT SUCH INFORMATION OR DOCUMENTATION AND FOR WHAT USE AND PURPOSE SAID INFORMATION OR DOCUMENTATION IS INTENDED AND WILL BE USED:

This information will assist DMEA in meaningfully evaluating Tri-State's buyout calculation for DMEA and in establishing equitable exit terms from membership in Tri-State Generation & Transmission.

IF THIS REQUEST IS MADE ON BEHALF OF ANOTHER PERSON OR PERSONS OTHER THAN YOURSELF OR ON BEHALF OF, OR IN THE NAME OF, ANOTHER PERSON, FIRM, CORPORATION OR ASSOCIATION, PLEASE ATTACH AN ADDITIONAL PAGE STATING THE NAMES, BUSINESS, ADDRESSES, AND TELEPHONE NUMBERS OF SUCH PERSON(S), FIRM(S), OR ASSOCIATION(S).

IF YOU ARE REPRESENTED BY AN ATTORNEY AT LAW IN MAKING THIS REQUEST, PLEASE STATE SUCH ATTORNEY'S NAME, BUSINESS ADDRESS AND TELEPHONE NUMBER:

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Date: 24 April 2018

(Signature)

, Chairman and President	Date: 3-7-18

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Attachment 1

Information DMEA requests pursuant to its April 24, 2018 Tri-State Policy 406 Request

1. DMEA requests all information provided by or on behalf of Kit Carson Electric Cooperative, Inc. (Kit Carson) to Tri-State and that is relevant to the terms and conditions Tri-State and Kit Carson negotiated in connection with Kit Carson's withdrawal from Tri-State.

2. DMEA requests the information and any underlying models (e.g., spreadsheet or similar matrix) used to calculate the mark-to-market buyout methodology used in Kit Carson's withdrawal from Tri-State.

3. DMEA requests all other relevant inputs, assumptions, or data used in calculating the amount paid by Kit Carson in connection with its withdrawal from Tri-State.

4. DMEA requests all outputs (including modeling outputs and those outputs shared with Kit Carson) relevant to calculating the amount paid by Kit Carson in connection with its withdrawal from Tri-State.

5. DMEA requests all information generally presented to Tri-State members (or available to those members) prior to the Kit Carson exit that discusses the "mark-to-market" buyout methodology and alternatives to that methodology.

DMEA will keep this information confidential pursuant to DMEA and Tri-State's January 11, 2017 confidentiality agreement. Kit Carson has indicated in writing that it does not object to Tri-State's sharing any of its withdrawal-related information with DMEA.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
HEADQUARTERS: P.O. BOX 33695 DENVER, COLORADO 80233-0695 303-452-6111

May 8, 2018

Jasen Bronec
Chief Executive Officer
Delta-Montrose Electric Association
P.O. Box 910
Montrose, CO 81402

Dear Jasen,

This is in response to your correspondence of April 24, 2018 where you asked for certain information from Tri-State related to Kit Carson Electric Cooperative's withdrawal from Tri-State. Your request was made under Board Policy 406, and I am responding as the policy directs.

Article I, Section 3 of the Tri-State bylaws provides that no member shall be permitted to withdraw until it has met all of its contractual obligations to Tri-State. I have consistently told you and others who have asked about this, that information used to calculate the value to Tri-State of one Member System's wholesale electric service contract is not relevant to the value to Tri-State of any other Member Systems' contract. The value to Tri-State of each Member System's contract is different from that of any other Member System and is influenced by many factors, including the term of the contract, the date of withdrawal, current and projected market conditions, current and projected loads and Tri-State rates, among others.

Tri-State does not disclose one Member System's confidential information to another Member System, regardless of whether such information is subject to a confidentiality agreement. I know that Kit Carson has authorized Tri-State to release certain information (subject to certain conditions) to DMEA. However, we continue to consider the information you have requested to be confidential and we have informed Kit Carson that Tri-State does not agree to waive any of Kit Carson's obligations or any of Tri-State's rights under the parties' confidentiality agreement.

Further, the process of agreeing to a contract value necessarily involves an element of negotiation. The disclosure of such information regarding one Member System's withdrawal negotiation to any other Member System would disadvantage Tri-State's remaining members in any subsequent contract value negotiations.

Therefore, the information you have requested, in my opinion and in the opinion of Tri-State's General Counsel, is Restricted Information within the meaning of Tri-State Board Policy 406, subsections C (1)(e), (f) and (g).

For these reasons, I will not provide the information you have requested. However, I remain committed to attempting to resolve the withdrawal and contract valuation issue with DMEA.

Board Policy 316 provides a process for you to take this issue to the Board for their final determination. As you know, the policy is a two-step process that starts with an informal complaint to me, followed by a formal complaint to the Board. I think your request for this information, which I have denied, should be treated as an informal complaint. I see no reason to require you to jump through that hoop and get the same decision from me that I have made here. Therefore, Tri-State will waive the informal complaint process in this case and if DMEA wishes to file a formal complaint, it may do so under the formal complaint process in Board Policy 316.

Please let me know if you have any questions.

Sincerely,

Micheal S. McInnes

Micheal S. McInnes
Chief Executive Office

MSM/dkb

cc: Kenneth V. Reif, Senior Vice President and General Counsel

Tri-State Generation and Transmission Association, Inc.
Decision of the Board of Directors re:
Delta Montrose Electric Association Complaint under Board Policy 316

I. Procedural History and Nature of the Complaint

On May 30, 2018, Delta Montrose Electric Association ("DMEA") filed a formal complaint (the "Complaint") under Tri-State Generation and Transmission Association Inc. ("Tri-State") Board Policy 316 ("BP 316"). In summary, the Complaint alleges that Tri-State staff has refused to provide DMEA with: (1) documents relating to Kit Carson Electric Association's 2016 withdrawal from Tri-State (the "Kit Carson Information Dispute"); and (2) equitable terms for withdrawal from Tri-State (the "Withdrawal Dispute").

Tri-State's Board of Directors (the "Board") determined to consider the Complaint itself. By letter dated June 15, 2018 (the "Chairman's Letter"), the Chairman of the Board notified DMEA, all other Member Systems and Tri-State staff of the procedures that would govern the Board's consideration of the Complaint. In response to the Chairman's Letter, La Plata Electric Association ("La Plata") provided timely notice of its intention to present argument on the Complaint. Letters in support of and in opposition to the Complaint were received from San Isabel Electric Association, Inc. ("San Isabel"), Wheat Belt Public Power District ("Wheat Belt") and United Power, Inc. ("United"). Documentary evidence was submitted to the Board on behalf of DMEA, La Plata and Tri-State staff, along with the letters from San Isabel, Wheat Belt and United Power. The Board heard oral presentations from representatives of DMEA, La Plata and Tri-State Staff on July 10, 2018. Written statements of position were submitted by DMEA and Tri-State staff on July 25, 2018. On August 7, 2018, the Board deliberated on the issues raised in the Complaint.

II. Findings

1. DMEA's Various Wholesale Power Contracts

Prior to 1992, DMEA was a member of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), a generation and transmission cooperative whose members included DMEA and other Colorado distribution cooperatives. As of 1992, DMEA and Colorado-Ute's other members had contracts requiring them to purchase substantially all their electricity from Colorado-Ute through December 31, 2025.

In 1989, Colorado-Ute filed for protection from creditors under Chapter 11 of the United States Bankruptcy Code. Through the bankruptcy proceeding, DMEA and Colorado-Ute's other members gained the flexibility to acquire their future wholesale power requirements from any available source, including purchases on the spot market. Three Colorado-Ute members signed long term purchase contracts with Public Service Company of Colorado. Colorado-Ute's other members, including DMEA, elected instead to become members of Tri-State and to sign long term all requirements purchase contracts with Tri-State.

DMEA signed its first contract with Tri-State on March 27, 1992. This first contract took the form of an amendment to DMEA's existing all requirements contract with Colorado-Ute. Under this contract, DMEA promised to purchase substantially all its wholesale electric requirements from Tri-State through December 31, 2025.

On November 1, 2001, DMEA and Tri-State entered into a new wholesale electric service contract. This contract remains in force today. Tri-State promised to sell and deliver to DMEA and DMEA agreed to purchase and receive from Tri-State "all electric capacity and electric energy which [DMEA] shall require for the operation of [DMEA's] system" through "December 31, 2040." In the contract, DMEA specially acknowledged and agreed that:

- Tri-State had financed and in the future may finance new generation and transmission facilities in whole or in part through loans;
- Tri-State's indebtedness is evidenced by certain notes and secured by certain mortgages on Tri-State's assets, which promissory notes and mortgages would be amended, supplemented or restated from time to time in the future;
- Payments due to Tri-State from DMEA under the contract will be pledged and assigned to Tri-State's creditors to secure Tri-State's loans;
- Tri-State and its lenders were relying on DMEA's contractual power purchase commitment to provide for the development of Tri-State's facilities, the development of a generation and transmission system to serve DMEA, and for Tri-State to undertake a long-term planning and power supply acquisition program;
- Tri-State's lenders would rely on DMEA's wholesale electric service contract to assure that Tri-State's borrowing would be repaid;
- DMEA would work with Tri-State during the term of the contract to meet electric utility market challenges in a competitive environment; and
- The failure or threatened failure of DMEA to comply with its obligations under the contract will cause irreparable injury to Tri-State.

2. Tri-State's Reliance on DMEA's Contractual Promises

On an annual basis since 1992, DMEA has submitted to Tri-State a forecast of its future electricity requirements. Because Tri-State is bound contractually to meet DMEA's wholesale power requirements through the year 2040, Tri-State staff has used DMEA's long term power forecasts to plan, construct and maintain a generation and transmission system. Based upon the power forecasts of DMEA and other Tri-State members, Tri-State since 1992 has made large investments in generation and transmission assets and has incurred debt to finance these expenditures.

3. Historical Member Withdrawals from Tri-State

Over the past fifty years, several members have sought to withdraw from Tri-State, each under unique facts and circumstances.

a. Shoshone / Garland

In 1985, Shoshone River Power, Inc. ("Shoshone") and Garland Power & Light Co. ("Garland") entered into contracts to sell their distribution system assets to Pacific Power & Light Co. ("Pacific"). At the time, Shoshone and Garland had all requirements wholesale power contracts with Tri-State extending an additional thirty-five years. Shoshone and Garland advised Tri-State that once they had sold their assets to Pacific, they would no longer have any wholesale electrical requirements and therefore would purchase no additional power from Tri-State.

Tri-State filed suit to enjoin the asset sales. Ultimately, Shoshone was able to convey its assets to Pacific during a short gap in court-imposed injunctions. The federal courts ultimately enjoined the Garland transaction from closing, and Garland abandoned its proposed asset sale. Because Shoshone's assets had been transferred to Pacific, enjoining the transaction was not possible. Tri-State therefore sued both Shoshone and Pacific for money damages. Tri-State prevailed at trial and in two different appeals. Tri-State's damages were computed based upon what has become known as the "Shoshone Method." Under this method, an estimate is made of the present value of the revenue a departing Tri-State member would have paid to Tri-State through the remaining term of its contract, less the present value of costs Tri-State might reasonably avoid if the member were to withdraw, and less the present value of any incremental revenue Tri-State might reasonably expect to receive from any Tri-State assets presently used to serve the departing member. Ultimately, a substantial money damage judgment was entered in favor of Tri-State, and the Shoshone litigation was settled on financial terms extremely favorable to Tri-State.

b. Sheridan-Johnson

In June of 1996, Tri-State's board specified equitable terms and conditions for its member, Sheridan-Johnson Rural Electrification Association ("Sheridan-Johnson"), to withdraw. To achieve operational efficiencies, Sheridan-Johnson proposed to merge with Tri-County Electric Association ("Tri-County"), a neighboring distribution cooperative that was a member of Basin Electric Power Cooperative ("Basin"). Tri-County was to be the surviving entity and would continue to purchase all its electric requirements from Basin. To make Tri-State financially whole for the loss of Sheridan-Johnson's load, Basin committed to purchase from Tri-State (at Tri-State Class A member rates) all the electricity Sheridan-Johnson would have purchased from Tri-State during the remaining term of Sheridan-Johnson's all requirements contract with Tri-State. Upon the effective date of the Basin purchase contract, Sheridan-Johnson's contract with Tri-State was discharged and its membership rights in Tri-State terminated, except only the future repayment of certain capital credits.

c. DMEA's 2007 Indicative Buyout Amount

In response to various member inquiries, Tri-State staff in March of 2007 determined a buyout amount for each Tri-State member utilizing the Shoshone Method. Staff first calculated each member's 2006 contribution to Tri-State's fixed costs, *i.e.*, the member's 2006 wholesale power purchases minus the avoidable costs associated with those purchases (fuel, purchased power, wheeling and dispatch costs). The resulting 2006 loss to Tri-State was assumed to remain constant for each remaining year of the member's all requirements power contract. Losses for all remaining years of the member's contract were then discounted to present value using Tri-State's estimated weighted average cost of capital. The resulting net present value loss represented the amount a member should be required to pay to satisfy its contractual obligations to Tri-State. Using this methodology, an indicative "buyout" amount was computed and provided to each member. The indicative buyout number for DMEA was $189,702,000 and was communicated to DMEA by letter dated March 22, 2007.

d. NPSIG

In April of 2009, five Nebraska members (the "NPSIG Members") sought to withdraw from Tri-State. A committee of Tri-State's board was appointed to study the NPSIG Members' request. Ultimately, the committee recommended that the Board prescribe certain terms and conditions for the NPSIG Members' withdrawal. In September of 2009, the Board approved the committee's recommendation and established equitable terms and conditions for the NPSIG Members' withdrawal. Among other requirements, the Board required the NPSIG Members to make the following payments to Tri-State, calculated using the Shoshone Method:

Chimney Rock Public Power District	$21,285,000
Midwest Electric Cooperative Corporation	101,028,000
Northwest Rural Public Power District	33,536,000
Panhandle Rural Electric Membership Association, Inc.	38,752,000
Roosevelt Public Power District	25,176,000

Alleging (as DMEA does in the Complaint) that the buyout numbers computed by Tri-State staff were unfair, the NPSIG Members sued, asserting (among other claims) that Tri-State had breached Section 3(a) of the bylaws by failing to prescribe equitable terms and conditions for the NPSIG Members to withdraw. One NPSIG Member abandoned its lawsuit, but the other four pursued their claims to judgment. Based upon a jury verdict in Tri-State's favor on every disputed issue, the court dismissed NPSIG's lawsuit, finding that Tri-State had not breached section 3(a) of the bylaws. After their lawsuit was dismissed, the NPSIG Members abandoned their attempt to withdraw from Tri-State and remain as members today.

e. Tri-State's 2014 Contract Committee

In 2014, a Contract Committee which comprised one representative from each Member was appointed to review Tri-State's Wholesale Electric Service Contract with its Member Systems and to consider possible approaches to future withdrawal requests. Two external consultants were retained to review potential methodologies for future member withdrawals. Three methodologies were studied: the Shoshone Method; the Soyland Method and the so-called "Mark to Market" Method. The Committee also considered suggestions that it recommend a straight formula to apply to all future withdrawals. Ultimately, the Contract Committee recommended that the Board adopt the Mark to Market as the presumptive methodology to be used to compute buyout numbers for Tri-State members who propose to withdraw. The Board accepted the Contract Committee's recommendation.

The Mark to Market Method is similar conceptually to the Shoshone Method, but with several differences. The Shoshone Method assumes static financial statements through the end of the departing member's contract term, and essentially computes the net present value of the withdrawing member's annual contribution to Tri-State's fixed costs. By contrast, Mark to Market does not assume static Tri-State Class A Member rates or wholesale market prices throughout the departing member's remaining contract term. Instead, Mark to Market uses Tri-State's Long Term Financial Forecast ("LTFF") for Tri-State's Class A Member Rate through the remaining term of the departing member's contract term, and it estimates the market price of wholesale power during that same period using external market data. A buyout calculation under Mark to Market is therefore a unique calculation based upon a snapshot in time and is somewhat less formulaic than the Shoshone Method. In simple terms, Mark to Market computes the net present value of the LTFF Class A Rate forecast minus the market rate forecast, multiplied times the withdrawing member's load forecast. Additional

adjustments are made to take account of transmission costs, patronage capital, the value of expiring Board Policy 115 and 117 contracts and other factors.

Because it assumes that power Tri-State would have sold to the departing member would instead be sold into the wholesale market at varying prices over time, a Mark to Market calculation depends upon assumptions concerning future Class A Member rates and future wholesale market prices. When market prices are high, Tri-State members have little incentive to withdraw and the Mark to Market Method will result in a relatively lower buyout number. But when market prices are low (as they are presently), members have a greater incentive to avoid their Tri-State contracts and Mark to Market will result in a relatively higher buyout number. The larger the differential between the assumed future Class A Rate and the assumed wholesale market rate, the larger the buyout amount will be under Mark to Market.

f. Kit Carson

In 2014, Kit Carson Electric Cooperative ("KCEC") expressed its desire to withdraw from Tri-State, and it asked Tri-State for a buyout number that would satisfy KCEC's wholesale electric service contract obligations to Tri-State. Per the Board's direction, Tri-State staff negotiated a buyout number for Kit Carson using the Mark to Market Method. Information was exchanged between Tri-State and KCEC staff and because much of this information was confidential, Tri-State and KCEC executed a non-disclosure agreement that obligated each side to preserve the confidentiality of all information received from the other. Ultimately, staff for KCEC and Tri-State reached agreement on the terms and conditions under which KCEC could withdraw from Tri-State subject to the approval of their respective Boards. The Board approved those terms and conditions in June of 2016.

4. DMEA's Withdrawal and KCEC Information Requests

In late November of 2016, DMEA's board authorized its staff to negotiate terms and conditions under which DMEA could withdraw from Tri-State. In January of 2017 and again in August of 2017, DMEA submitted to Tri-State comprehensive information requests that DMEA claims is necessary to compute an appropriate buyout number. In April of 2018, DMEA submitted another information request to Tri-State seeking comprehensive information about the terms and conditions under which KCEC withdrew from Tri-State, including all assumptions and backup information regarding KCEC's buyout. In support of this request, DMEA provided a letter from KCEC's attorney authorizing Tri-State to release some of this information to DMEA.

Tri-State staff computed buyout numbers for DMEA using both the Shoshone Method and the Mark to Market Method. During the course of negotiations, Tri-State staff provided DMEA with all information concerning Tri-State's buyout calculations, including the buyout numbers themselves and key variables used in the Mark to Market calculation such as the amount of Class A Revenue assumed to be lost each year (demand and energy; the amount of market revenue received (dollars per Megawatt hour per year); credit for avoided transmission costs, including Tri-State's assumed Open Access Transmission Tariff; credit for capital credits; credit for benefits to Tri-State from re-dispatch of power; book value of stranded transmission, and the discount and inflation rates used in Tri-State's computation. DMEA conceded during the Policy 316 hearing that the information provided has allowed DMEA to essentially replicate Tri-State's buyout numbers as computed under the Mark to Market Method.

Although Tri-State staff provided much of the information DMEA has requested, it declined to provide confidential information concerning KCEC's withdrawal, particularly the financial information underlying the assumptions made in connection with KCEC's buyout calculations. Tri-State staff explained that it does not disclose one Member System's confidential information to another Member System, regardless of whether such information is subject to a confidentiality agreement. Further, Tri-State staff acknowledged that KCEC had authorized Tri-State to release certain information (subject to certain conditions) to DMEA. However, staff considers the information DMEA has requested to be confidential and staff refused to waive any of Tri-State's rights under the confidentiality agreement with KCEC.

5. Tri-State's Bylaws

Article I, Section 3(a) of Tri-State's bylaws specifies the only way a Member System can withdraw:

> A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to [Tri-State].

III. Conclusions

a. The Information Dispute

i. KCEC Buyout Information

Through the Complaint, DMEA asks the Board to require Tri-State staff to provide DMEA with virtually all documents or other information concerning KCEC's withdrawal from Tri-State. Among other things, DMEA has demanded that Tri-State staff provide:

- "all information provided by or on behalf of [KCEC] to Tri-State and that is relevant to the terms and conditions Tri-State and [KCEC] negotiated in connection with [KCEC's] withdrawal from Tri-State;
- "the information and any underlying models (e.g., spreadsheet or similar matrix) used to calculate the mark-to-market buyout methodology used in [KCEC's] withdrawal from Tri-State;
- "all other relevant inputs, assumptions or data used in calculating the amount paid by [KCEC] in connection with its withdrawal from Tri-State; and
- "all outputs (including modeling outputs and those outputs shared with [KCEC] relevant to calculating the amount paid by [KCEC] in connection with its withdrawal from Tri-State."

Tri-State staff properly declined to provide this information. First, the information is confidential to both KCEC and Tri-State. In the context of DMEA's desire to leave Tri-State, DMEA's financial interests are adverse to the interests of Tri-State and the remaining members. That is because every dollar less DMEA pays to "buy out" of its contract is a dollar that otherwise would be received by Tri-State for the benefit of all remaining members. Viewing DMEA's request in this light makes it clear that DMEA's request for the KCEC information is not reasonable. While negotiating against the interests of Tri-State, DMEA asks the Board to require Tri-State staff to surrender its confidential negotiating information. Such a request is unreasonable under the circumstances.

Also, providing volumes of calculations and information about KCEC's withdrawal will be a burdensome exercise that, at best, will only distract the parties by focusing on a transaction that has little or no relevance to DMEA's proposed withdrawal from Tri-State. The Mark to Market Method creates a buyout number based upon a unique set of circumstances that exists at a point in time. In the case of KCEC's withdrawal, those circumstances have long since passed and are quite different from those presented by DMEA's proposed withdrawal.

ii. DMEA Buyout Calculations

DMEA has also demanded that Tri-State staff provide "[t]he underlying model (e.g. spreadsheet or similar matrix) used to calculate the 'Mark to Market' buyout methodology used in Tri-State's January 11, 2017 DMEA withdrawal discussions." However, substantially all the inputs necessary for DMEA to replicate the buyout calculation has been provided to DMEA. Moreover, DMEA's Mr. Bronec conceded that with the information Tri-State has provided, DMEA has "more or less" been able to replicate the buyout number Tri-State has provided. Under these circumstances, there is no reason for DMEA to demand that Tri-State's own spreadsheet and other work product be turned over to DMEA.

In conclusion, the Board finds that DMEA's various information requests are unreasonable and should be denied.

b. The Withdrawal Dispute

DMEA asks the Board to "direct TSGT management to negotiate terms of a fair and equitable withdrawal."

As the Board understands Section 3(a) of Tri-State's bylaws, it may but need not prescribe equitable terms and conditions for DMEA to withdraw from Tri-State. If the Board does decide to prescribe equitable terms and conditions for DMEA to withdraw, the Board must require the member to meet all its contractual obligations to Tri-State. Therefore, the threshold question the Board must decide is whether to provide equitable terms and conditions for DMEA to withdraw. Only if the Board answers this question in the affirmative must it comply with the Section 3(a) requirement that DMEA "shall [not] be permitted to withdraw until it has met all its contractual obligations to [Tri-State]."

In the present case, DMEA can withdraw as a Tri-State member while continuing to honor its power purchase contract through December 31, 2040. As between DMEA and the remaining Tri-State members, this would avoid any reallocation of the financial risk to which the parties agreed when the contract was signed. The Board therefore directs Tri-State staff to negotiate equitable terms and conditions for DMEA to withdraw from Tri-State, while continuing to honor all of its contractual obligations to Tri-State.

Under bylaw Section 3(a), the Board also has discretion to specify withdrawal terms for DMEA that include a contract buyout. Because any buyout number will inevitably be based upon assumptions that are to some extent speculative, the Board agrees with Tri-State staff that the risk of such assumptions proving to be wrong should be borne by DMEA and not by the remaining Tri-State members.

For these reasons, the Board directs Tri-State staff to recommend equitable terms and conditions under which DMEA may withdraw as a member of Tri-State. Such terms and conditions should allow DMEA to withdraw from membership while continuing to honor its wholesale electric service contract with Tri-State. Staff may (but need not) alternatively provide for a buyout and a complete discharge of DMEA's wholesale electric service contract. If Tri-State staff does recommend a buyout of DMEA's contract, assumptions upon which the buyout number are based should be equitable while resolving all reasonable doubts in a manner designed to protect the financial interests of remaining Tri-State members.

By and on behalf of the Board of Directors

Rick Gordon, President and Chairman

Dated: August 23 2018

FAQS:
PROPOSED TRI-STATE BYLAW AMENDMENTS

Q. Why are changes being proposed?

A. They are being proposed to prevent future litigation against Tri-State and to protect the Members from the risk of being held liable for the negligence of other Members in the operation of their distribution systems and to help reduce litigation expenses in the future.

Q. Why is that a problem?

A. Last year, Tri-State was a defendant in a case in New Mexico that was filed as the result of a large fire that occurred in 2011. It was called the Las Conchas fire. The fire was caused when a tree located outside of a distribution right of way fell onto a 69kV line that was owned and operated by a Tri-State member. Tri-State had no involvement with the ownership, operation or maintenance of the line or the right of way, and no Tri-State lines or substations were in any way involved in the fire.

Q. How did Tri-State become a defendant if it had nothing to do with the line that started the fire?

A. Plaintiffs argued that Tri-State should be held liable on two theories. The first theory was that Tri-State and each of its 44 Members were not separate companies. They argued that Tri-State and its Members were a joint venture or a joint enterprise. Under that theory, Tri-State would be jointly and severally liable for any negligence of any of its Members. That would mean that Tri-State would be 100% responsible for damages resulting from any negligent act of any one of its Members. Of course, the cost of the damages would be passed through to all 44 members through higher rates.

Q. What was the second theory?

A. Plaintiffs also argued that even if Tri-State was not a joint venture or joint enterprise, it had an absolute right –and therefore the obligation– to control the maintenance and operation of a Member's distribution system. Plaintiffs claimed that Tri-State failed to exercise that control. Under that theory, Tri-State would be liable for some or all of Plaintiffs' damages, with the percentage of liability to be allocated among the various entities by the jury.

Q. What happened in the case?

A. Tri-State filed a motion for summary judgment asking the judge to dismiss the claims against Tri-State. We argued that Tri-State and each of its members were separate legal entities. We argued that Tri-State owned and operated its generation and transmission facilities and had legal responsibility for only those facilities. We argued that the Members owned and operated the distribution facilities and had all of the legal responsibility for those facilities. We also argued that Tri-State had no right to control the operation and maintenance of any of the distribution facilities of our Members, and therefore no obligation to do so. The judge denied our motion for summary judgment and ordered the case to a full trial.

WHY ARE CHANGES PROPOSED?

THEY ARE BEING PROPOSED TO PREVENT FUTURE LITIGATION AGAINST TRI-STATE AND TO PROTECT THE MEMBERS FROM THE RISK OF BEING HELD LIABLE FOR THE NEGLIGENCE OF OTHER MEMBERS IN THE OPERATION OF THEIR DISTRIBUTION SYSTEMS AND TO HELP REDUCE LITIGATION EXPENSES IN THE FUTURE.

Q. Why did he deny the motion?

A. In part, he relied on language in Tri-State's bylaws that he claimed supported the plaintiffs theories, at least to the extent that a jury should be permitted to decide whether Tri-State and its Members were a joint enterprise or joint venture, and whether Tri-State had control over the operation and maintenance of a Member's distribution system.

Q. What did the jury decide?

A. We had a 5 week trial in New Mexico. Ultimately, the jury decided that Tri-State and its Members were not a joint venture or joint enterprise. However, the jury did decide that Tri-State had the right to control the operation and maintenance of the Member's distribution line. The jury allocated 20% of the liability to Tri-State. We don't yet know the amount of damages in the fire. Damages will be determined in separate trials to be held late this year and early next year. We will have the right to appeal after the damages have been determined.

Q. So, why does Tri-State want to amend the bylaws?

A. We want to clarify and reaffirm the meaning and intention of the bylaws as the Members intended and have always understood them. The 44 Members have never considered themselves to be parties to a joint venture or joint enterprise. The Members have never considered that Tri-State has the right to control the operation and maintenance of the Member's distribution system. And they have never believed that one Member should be responsible for the negligence of another Member.

The proposed changes reinforce that Tri-State and its Members are independent cooperative corporations, that they are not a joint venture or joint enterprise and that Tri-State is solely responsible for the operation and maintenance of the generation and transmission facilities that it owns, while the Members are solely responsible for the operation and maintenance of the distribution facilities they each separately own.

We believe that making these changes will make it less likely that anyone suffering injury due to the alleged action or inaction of a Member will join Tri-State as a defendant. Even if that happens, we believe the bylaw amendments will make it more likely that a judge will grant our summary judgment motion and that we will not have to go through a lengthy and costly trial.

Q. Are all of the proposed bylaw changes related to the Las Conchas fire?

A. No. There is one change being proposed in response to the litigation we had with 4 of our Nebraska members that concluded in 2014.

Q. What happened there?

A. The Nebraska plaintiffs filed suit in federal district court alleging, among other things, that Tri-State had breached its contract with them by failing to offer them a rate different than the Class A rate that Tri-State had historically applied to all of its Members. They also claimed that the "buy-out" number that the Board had proposed for them to withdraw from Tri-State was unfair and that a jury should determine the fair buy-out number.

Q. What happened in that case?

A. Tri-State had again filed a motion for summary judgment arguing that the judge should dismiss the claims because the bylaws provided that the Board had authority to set the rates and had authority to determine the "buy-out" number and conditions of withdrawal. The judge granted the motion to dismiss the different rate claim because he found that the language in the bylaws made it clear that the Board had full authority to set the rates. He denied the motion as to the "buy-out" claim because the bylaws provided that the terms and conditions of any withdrawal must be "equitable". He held that only a jury could determine what was equitable, and therefore directed the parties to trial on that issue.

Q. What did the jury do?

A. Ultimately, after a 3 week trial, the jury determined that the "buy-out" terms set by the Board were equitable and the jury found in favor of Tri-State. But we incurred significant legal costs as well as significant staff costs in having to go to trial.

Q. What is the bylaw change intended to do?

A. It is intended to make the Board's authority in setting the "buy-out" terms and conditions the same as the Board's authority to set rates. Then, in any future litigation, we expect to have a much better chance of having a motion for summary judgment granted so that we won't have to go to a full trial and incur those additional legal and staff costs.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
HEADQUARTERS: P.O. BOX 33695 DENVER, COLORADO 80233-0695 303-452-6111

M E M O R A N D U M

DATE: February 10, 2016

TO: Tri-State Directors
Tri-State Members Managers

FROM: Ken Reif

SUBJECT: Review of Tri-State Bylaws

Enclosed is a complete copy of Tri-State's Bylaws with suggested changes in redline format that have been approved by the Board of Directors to be considered by the membership at the Annual Meeting.

Explanation of Proposed By-Law Changes

These changes clarify and reaffirm the meaning and intention of the existing bylaws. They describe the business relationship between Tri-State and its Members and make clear the respective responsibilities of Tri-State and the Members with respect to the operation and maintenance of the separate electric facilities that Tri-State and each Member own independently. The changes do not alter the existing relationships but simply confirm how those relationships have operated and been interpreted by Tri-State and its Members since Tri-State's inception.

The changes are being proposed as the result of a jury verdict from a New Mexico State District Court in October of 2015. That case (the Las Conchas fire case) concerned a large wildfire that started when a tree struck a distribution tap line owned and operated by a Member. In the lawsuit, Plaintiffs alleged that Tri-State and its Members were not independent cooperative corporations. Instead, they claimed that Tri-State and its Members were a Joint Venture or Joint Enterprise, and that Tri-State was therefore responsible for the operation and maintenance of the Member's electric distribution system. They further argued that Tri-State had the right to control the operation and maintenance of the Member's distribution system. Based on Tri-State's so-called right of control, Plaintiffs contended that the jury should hold Tri-State responsible for the Member's alleged failure to clear the line.

In support of both contentions, Plaintiffs argued that certain language found in the current bylaws supported a finding of a Joint Venture and the right of control. While the jury rejected the claim of Joint Venture and Joint Enterprise, it did find that Tri-State was 20% responsible for any damages that resulted from the fire.

The proposed bylaw changes reinforce that Tri-State and its Members are independent cooperative corporations, that they are not a Joint Venture or Joint Enterprise, and that Tri-State is solely responsible for the operation and maintenance of the generation and transmission facilities it owns, while the Members are solely responsible for the operation and Maintenance of the distributions facilities they each separately own.

In addition to the clarifying language, there is one substantive change that makes it clear that the Tri-State Board of Directors has the sole discretion and responsibility to determine the terms and conditions of any withdrawal by a Member. This proposed change is intended to reduce the potential for conflict in situations where a Member wishes to withdraw and the Member and Tri-State cannot agree on the terms and conditions of withdrawal.

Senior Vice President and General Counsel

KR/plm

Enclosure

AMENDED AND RESTATED
BYLAWS
OF
TRI-STATE GENERATION AND
TRANSMISSION ASSOCIATION, INC.

ARTICLE I
MEMBERSHIP

Section 1: Membership. Applicants for membership in this Corporation shall be eligible for membership by:

(a) Executing a written application for membership and agreeing to pay the membership subscription, if any, established by the Board of Directors from time to time;

(b) Agreeing to purchase from this Corporation electric power and energy as hereinafter specified in Section 2 of this Article I; and

~~(c) Agreeing~~(c) Subject to Sections 6 and 7 of Article II of these Amended and Restated Bylaws, agreeing to comply with and be bound by the Articles of Incorporation and Bylaws of this Corporation and any rules and regulations that relate to or concern the governance, oversight or management of this Corporation as adopted by the Board of Directors.

Each member of this Corporation as of the date of these Amended and Restated Bylaws shall be and continue to be members of this Corporation, until termination of such membership as contemplated herein. Subject to the foregoing, no applicant shall become a member unless and until it has been accepted for membership by the Board of Directors or the members. No member may hold more than one membership in this Corporation, and no membership in this Corporation shall be transferable. Each member shall be entitled to one (1) vote and no more upon each matter submitted to vote at a meeting of the members. Provision may be made in these Bylaws for additional classes of membership.

Section 2: Purchase of Electric Power and Energy.

(a) Unless otherwise specified by written agreement, each member shall terminate any contract which it may have for the purchase of electric power and energy from any other supplier when electric power and energy becomes available from this Corporation or as soon thereafter as it may legally do so, and shall purchase from this Corporation all electric power and energy used by the member. Each member shall pay therefor monthly at rates or on a basis to be determined from time to time in accordance with these Bylaws. In connection with such purchase, each member and this Corporation expressly disclaim any intent or agreement to be a partnership, joint venture, single or joint enterprise, or any other business form except that of a cooperative corporation and member.

(b) It is expressly understood that amounts paid for electric power and energy in excess of the cost of service are furnished by members as capital in this Corporation, and not as profit of or to this Corporation, and each member shall be credited with capital so furnished as provided in these Bylaws. Each member shall also pay all amounts owed by such member to this Corporation as and when the same shall become due and payable.

(c) The electric power and energy purchase requirements set forth in this section shall apply to members' all-requirements contracts with Tri-State Generation and Transmission Association, Inc., in existence prior to the effective date of these Amended and Restated Bylaws.

Section 3: Withdrawal, Expulsion, Termination and Reinstatement of Membership.

(a) A member may withdraw from membership upon compliance with such ~~equitable~~ terms and conditions as the member may agree with the Board of Directors or, absent such an agreement,

upon compliance with such terms and conditions as the Board of Directors in its sole discretion may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation. The Board of Directors may, by the affirmative vote of not less than two-thirds (2/3) of all the directors, expel any member who fails to comply with any of the provisions of the Articles of Incorporation, Bylaws, or rules and regulations adopted by the Board of Directors from time to time, but only if such member shall have been given written notice by the Secretary of this Corporation that such failure makes it liable for expulsion from membership, and such failure shall have continued for at least ten (10) days after such notice was given. Any expelled member may be reinstated by vote of the Board or by vote of the members at any annual or special meeting.

(b) Upon withdrawal, cessation of existence, or expulsion of a member, the membership of such member shall thereupon terminate. Termination of membership in any manner shall not release a member from any debts due this Corporation nor impair the obligations of a member under any contract with this Corporation.

(c) The Board of Directors shall have authority to prescribe ~~equitable~~in its sole discretion the terms and conditions to be applied when a member withdraws from membership, ceases existence, or is expelled from membership, and such may be done by policy or otherwise and may include procedures for the establishment of a trust fund to receive on behalf of such member's patrons all patronage capital as this Corporation may from time to time distribute to all of its members, or in lieu thereof procedures whereby a member proposing to withdraw from membership or ceases existence or who is expelled from membership, may elect to receive a discounted amount of patronage capital which has been allocated at the time of such withdrawal,

cessation of existence, or expulsion from membership.

ARTICLE II
RIGHTS AND LIABILITIES OF MEMBERS

Section 1: Property Interest of Members. Members shall have no individual or separate interest in the property or assets of this Corporation, except that upon dissolution, after (a) all debts and liabilities of this Corporation shall have been paid, and (b) all capital furnished through patronage shall have been returned, as provided in these Bylaws, the remaining property and assets of this Corporation shall be distributed among the members in the proportion which the aggregate patronage of each bears to the total patronage of all members and former members pursuant to the provisions of applicable law.

Section 2: Non-Liability For Debts of Corporation. The private property of the members shall be exempt from execution or other liability for the debts of this Corporation and no member shall be liable or responsible for any debts or liabilities of this Corporation.

Section 3: ~~Operation of Member's System. Except to the extent that failure shall be due to a cause beyond its~~Member's Requirement to Purchase Wholesale Electric Power and Energy. Member shall not reduce, suspend, transfer or contract away its requirements for wholesale electric power and energy purchased from this Corporation during the term of its all-requirements contract, unless such reduction, suspension, transfer or contraction shall be due to a cause beyond the member's control (such as failure of facilities, flood, earthquake, storm, fire, lightning, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, inability to obtain permits, licenses, rights-of-way or authorizations from any local, state or federal agency or any person, or restraint by court or public authority), which by exercise of due foresight the member could not have reasonably been expected to avoid, and which by exercise of ~~due diligence~~reasonable efforts it shall be unable to overcome~~, each member shall continuously operate and maintain its system for the full term of its all requirements contract with this Corporation, using reasonable diligence to supply therefrom to patrons within its service area (without contraction due to acts of omission of the member) electric energy provided by this Corporation pursuant to the all requirements contract.~~. This provision is enforceable by specific performance and/or injunction but shall not apply to a member's day-to-day business operations, including the member's operations and maintenance practices relating to its electric distribution system.

Non-Confidential

DMEA APPEAL OF THE TRI-STATE AUGUST 23, 2018 POLICY 316 DECISION

OVERVIEW

DMEA appeals the Tri-State Board's August 23, 2018 written decision ("Decision") under Tri-State Board Policy 316.[1]

Kit Carson exited Tri-State in 2016 for $37 million. A Tri-State press release at the time described that exit number as "fair and equitable." Seven months later, Tri-State gave DMEA [redacted] million buyout price—nearly [redacted] more. Tri-State claimed it applied the same mark-to-market exit approach for Kit Carson and DMEA. Yet *none* of the mark-to-market calculation factors explained the discrepancy: DMEA was not [redacted] than Kit Carson. The price of power on the market hadn't changed by [redacted] Tri-State's power prices hadn't changed by [redacted]

While attempting to negotiate an equitable withdrawal from Tri-State, DMEA sought information to understand how the same Tri-State mark-to-market methodology yielded such dramatic differences. This included Policy 406 information requests for both DMEA and Kit Carson-related information. (Kit Carson had consented to disclosure.) Dissatisfied with Tri-State's response to the requests and Tri-State's position in the exit negotiations, DMEA filed this Policy 316 complaint.

The core issue in DMEA's Policy 316 complaint is whether the DMEA buyout number is fair and equitable under Tri-State's bylaws. DMEA believes that Tri-State's refusal to provide a fair number—or to justify its dramatically higher number—suggests arbitrariness and bad faith, violates DMEA's legal rights and public policy, and directly harms DMEA and the retail members it serves.

Tri-State staff drafted its own position statement on DMEA's information request and asked the Board to direct Tri-State staff to negotiate "equitable terms" that "allow DMEA to withdraw from membership while continuing to honor its wholesale electric service contract with Tri-State." (Tri-State July 25 Position Statement at 10.) Staff alternatively asked the Board to authorize staff to, at its discretion, negotiate an equitable contract buyout while "resolving all reasonable doubts in a manner designed to protect the financial interests of remaining Tri-State members." (*Id.*)

The Tri-State Board's Decision largely mirrors Tri-State staff's July 25 reasoning, conclusions, recommendations, and language. The Decision reflects virtually no meaningful consideration of the arguments DMEA made during its July 10 Policy 316 hearing presentation, DMEA's own July 25 position statement (included with this appeal as Attachment A), or the comments provided by other member cooperatives during the Policy 316 complaint process.

Tri-State's Decision fails to address DMEA's arguments, misstates factual issues, and misapplies the law. DMEA asks the Tri-State Board to change its position and to adopt the proposed findings and directives from DMEA's July 25 position statement (Attachment A at Section III).

[1] This appeal only summarizes DMEA's objections to the Decision, and DMEA may advance other arguments in the future. Kyle Martinez, who serves as a director for DMEA and Tri-State, had no role relating to this appeal.

OBJECTIONS AND APPEAL

I. DMEA IS ENTITLED TO ALL INFORMATION ABOUT ITS OWN CALCULATIONS.

A. Tri-State admits to withholding important DMEA-related modeling and information.

The Decision endorses the Tri-State staff's confused approach to DMEA's request for its buyout information and modeling. Tri-State claims to have "provided DMEA with *all information* concerning Tri-State's buyout calculations." (Decision at 5 (emphasis added).) Tri-State lists the key inputs it gave and claims the information was so comprehensive that DMEA conceded it could "more or less" "replicate" the Tri-State buyout number. (*Id.* at 7.)

If Tri-State had provided DMEA with "all information" about Tri-State's buyout calculations, however, it would have denied DMEA's information request by explaining that DMEA had everything. But Tri-State didn't argue that. This is because, as Tri-State quickly conceded in a single line of the Decision, Tri-State continues to withhold a spreadsheet "and other work product." (*Id.* at 7.)

B. The withheld information would help DMEA understand Tri-State's exit calculations.

Tri-State emphasizes more than once that DMEA can "replicate" the final Tri-State buyout number based on the "inputs" Tri-State has provided. (Decision at 5, 7.) But replicating a buyout formula using inputs is different from understanding how the inputs themselves were derived.

As DMEA explained in its July 25 written statement (Attachment A at Question 7), DMEA has not seen the withdrawal calculation spreadsheet with its assumptions, data, inputs, and formulas that DMEA can analyze and understand. Without access to this spreadsheet and work product, DMEA can only speculate how Tri-State staff calculated the variables in DMEA's disproportionately large exit number. Essentially Tri-State says "x + y – z = DMEA's exit price," but won't show how it calculated x, y, or z. DMEA asks to see how the variables were calculated.

It's wrong for Tri-State staff to conflate certain inputs (which it has given DMEA) with the information establishing the inputs (which it has not given). Yet that's exactly what Tri-State has done. As DMEA's CEO stated at the July 10 Policy 316 hearing, DMEA generally understands how Tri-State reached its overall calculation, "but not the details of each component that you plug into that calculation."

C. It is reasonable for DMEA to request Tri-State's withheld information.

As explained above, Tri-State justifies saying that DMEA's request is "unreasonable and should be denied" (Decision at 7) by wrongly conflating two kinds of information. Tri-State claims to be applying an established mark-to-market formula to calculate DMEA's buyout. It is reasonable for DMEA as a Tri-State member-owner to want transparency with respect to how Tri-State reached the inputs, particularly given the [redacted] million buyout number. DMEA understands Kit Carson was provided with its spreadsheet and work materials and respectfully requests that the Tri-State Board direct management to share with DMEA all of its own information.

II. THE REQUEST FOR KIT CARSON'S INFORMATION SHOULD ALSO BE GRANTED.

Tri-State gives three reasons for rejecting DMEA's request for Kit Carson-related information. It first says the information is confidential to Kit Carson. It next says disclosure would harm other Tri-State members because their interests are adverse to DMEA's. Finally, Tri-State claims that disclosing the information will be a uselessly "burdensome exercise" because the Kit Carson exit "has little or no relevance" to DMEA's proposed withdrawal. (Decision at 7.) Each of these justifications lacks merit. The last two reasons also contradict each other.

A. Tri-State cannot justify withholding Kit Carson-related information when written permission has been given to share it with DMEA.

Kit Carson consented to disclosure of its exit-related information and calculations to DMEA in an April 13, 2018 letter to Tri-State. The Tri-State Decision notes that the letter authorizes disclosure (*id.* at 5) but omits the letter from its analysis. Tri-State "does not disclose one Member System's confidential information to another Member System," it says, "regardless of whether such information is subject to a confidentiality agreement." (Decision at 6.) This is a red herring. It ignores that Kit Carson, a (former) member system, *explicitly consented* to disclosure to DMEA. It also ignores Tri-State Policy 406(C)(1)(f), which lets Tri-state "release such information" when it gets "written authorization of the Member System that supplied the information." That is precisely what happened here, as detailed in DMEA's July 25 position sheet (Attachment A at Question 13).

The Decision also justifies withholding information on the ground that Tri-State staff has "refused to waive any of Tri-State's rights under the [Kit Carson] confidentiality agreement." (Decision at 6.) This doesn't logically follow: Tri-State says the confidentiality agreement with Kit Carson "obligated each side to preserve the confidentiality of all information *received from the other*." (*Id.* at 5 (emphasis added).) Kit Carson has released Tri-State from its obligation to preserve Kit Carson's information. Tri-State cannot force Kit Carson to keep Kit Carson's own information confidential.

B. Refusing to release the Kit Carson-related information because of supposedly "adverse interests" between DMEA and other Tri-State members reflects a troubling approach by Tri-State to its member relationships.

Tri-State says the requested Kit Carson information is also confidential to Tri-State itself and should not be shared because, when it comes to exit, "DMEA's financial interests are adverse to the interests of Tri-State and the remaining members." (Decision at 7.) "[E]very dollar less DMEA pays to 'buy out' of its contract is a dollar that otherwise would be received by Tri-State for the benefit of all remaining members." (*Id.*) The Decision misses the mark for several reasons.

As an initial matter, there are situations wherein one member's financial interests are "adverse" to those of other members and yet Tri-State addresses the matter transparently and forthrightly. Policy 115 projects, energy efficiency projects, and rate making, for example, place "adverse" cooperatives against each other. Why treat member exit differently?

Second, and more fundamentally, knowledge of a member's equitable exit information would not disadvantage other Tri-State members. It would benefit them: When Kit Carson withdrew, Tri-State issued a press release declaring the exit "fair and equitable, and protect[ing] the interest of all the

association's members." If the Kit Carson exit was "fair and equitable" to all Tri-State members, how are members disadvantaged if Tri-State treats another exiting member on similar terms? The votes of the non-exiting members will greatly outnumber that of the exiting member. There is no reason for Tri-State to fear negotiating with an informed member.

Third, Tri-State frames an exiting member as an outside "adversary." This conflicts with cooperative membership principles and fails to account for the fact that Tri-State's own Bylaws provide that member exits are to occur on fair and "equitable" terms. The Bylaws direct the parties to reach *equitable* terms, not terms that maximize the advantage of either the exiting member or the remaining members.

Fourth, transparency about an exit ultimately *protects the rights of every other cooperative*. Transparency within the Tri-State membership reaffirms to each member that, should at some point in the future it also consider exiting (consistent with Tri-State's "core principle" of voluntary membership), it would be treated consistently and fairly with those that had withdrawn earlier.

Fifth, transparency is necessary for members to know how the cooperative handled each negotiation from a financial standpoint. Did management do an effective job negotiating the exit of a given cooperative? Was it indeed "fair and equitable" such that the exit produced terms that preserve the financial health of Tri-State? Without this information—which again Tri-State Staff insists on withholding from any scrutiny—neither Tri-State's Board nor its member-owners can answer those critical questions. (*See* Attachment A at Question 15.)

Tri-State's framing the issue in purely adversarial terms reveals a fundamental misunderstanding about the nature of a cooperative. Members are not "adverse" parties to be guarded against; they are *the reason* Tri-State was formed. Treating the exiting member fairly and equitably benefits all of the members. Tri-State should honor the commitment it made to every member wanting to exit—not disparage it, and not undermine it—just as it would honor any other contractual obligation.

C. Tri-State contradicts its own assertion that the Kit Carson exit "has little or no relevance" to DMEA's exit.

Tri-State argues that exiting member cooperatives are incomparable apples and oranges. Kit Carson's exit, it claims, "has little or no relevance to DMEA's proposed withdrawal from Tri-State" because the "Mark to Market Method creates a buyout number based upon a unique set of circumstances that exists at a point in time." (Decision at 7.) The circumstances of Kit Carson's exit "have long since passed" and are thus "quite different from those presented by DMEA's proposed withdrawal." (*Id.* at 7.)

This argument lacks merit primarily because the nature of Tri-State's mark-to-market methodology *makes* the exit of one member relevant to the others. There are three major factors in Tri-State's mark-to-market exit methodology: the size of an exiting member's load, future market power prices, and Tri-State's rates. Each one of these factors can be adjusted to reflect different circumstances and then be compared. Kit Carson provides a benchmark reference for fair and equitable exit terms. The exact same methodology applies to DMEA. *How* Tri-State projected market conditions, loads, rates, etc., and *how* it incorporated these factors into its Kit Carson exit number, are relevant factors that DMEA should know.

Of course, Kit Carson's information will not be exactly on point in every respect. Time has passed, load forecasts are different, and so on. But it's still a meaningful reference: As DMEA previously noted, a 2016 road map is still relevant for a driver in 2018 even if the map is two years old.

In any event, if the information truly has "little or no relevance," why not share it and put the burden of proving its relevance on DMEA? Tri-State's seeming lack of confidence in its argument for irrelevance is telling.

But most telling is Tri-State's Decision itself, which demonstrates the continued relevance of the Kit Carson exit and why this information is critical. Tri-State complains that DMEA's request for Kit Carson-related exit information would undermine Tri-State's negotiating position, arguing that "[w]hile negotiating against the interests of Tri-State, DMEA asks the Board to require Tri-State staff to surrender its confidential negotiating information." (Decision at 7.) DMEA doubts that Tri-State would make that assertion if Kit Carson's exit truly had "little or no relevance."

Tri-State's eagerness to declare the Kit Carson exit information irrelevant yet at the same time assert it could be damaging to Tri-State's negotiating position merits scrutiny. If Kit Carson's $37 million exit number was equitable and covered other members' risk, as management claims (while withholding the relevant information it says supports that), then DMEA's [redacted] number is inequitable. If DMEA's [redacted] exit number is necessary to cover the risk to Tri-State's remaining members, Kit Carson's exit unfairly left the remaining members with millions of dollars in risk. Either way, management's actions—including what they represented to the Board during Kit Carson's exit, and what they're representing now—are deeply troubling.

III. TRI-STATE'S POSITION THAT IT MAY, BUT NEED NOT, ALLOW EXIT ON FAIR AND EQUITABLE TERMS IS INCONSISTENT WITH ITS PREVIOUS POSITIONS, SUGGESTS ARBITRARINESS AND BAD FAITH, VIOLATES PUBLIC POLICY AND HARMS BOTH DMEA AND ITS RETAIL DISTRIBUTION MEMBERS.

In its July 25 written statement, Tri-State staff asserted the Tri-State bylaws say the Board "may, but need not" prescribe equitable terms and conditions for exit. (Tri-State July 25 written statement at 6.) The word "may," TSGT says, grants "discretion and imposes no obligation." (*Id.*) DMEA's withdrawal is thus "entirely within the discretion of the Board." (*Id.* at 8.) As with virtually every other question, Tri-State's Board appears to have endorsed management's view in the Decision without any analysis. It observes: "As the Board understands Section 3(a) of Tri-State's bylaws, it may but need not prescribe equitable terms and conditions for DMEA to withdraw from Tri-State." (Decision at 7.)

A. Tri-State's denial that its members have a right to a fair and equitable exit is inconsistent with its previous positions.

Tri-State's position in its Decision that it could (but need not) let a member exit on equitable terms is inconsistent with the position it took in the NPSIG/*Chimney Rock* litigation referenced on page 4 of the Decision. That litigation presumed that the NPSIG members had the right to exit on equitable terms as provided in the Tri-State Bylaws, Article 1, Section 3.

Tri-State's position is also inconsistent with Tri-State staff's 2016 attempt to amend that section of the Bylaws. The proposed amendment would have removed the requirement that members be allowed to withdraw on "equitable terms and conditions" and instead let Tri-State set the terms of any

withdrawal "in its sole discretion." (*See* Exhibit 2 to DMEA's May 30, 2018 Policy 316 Complaint.) The attempted amendment failed, yet Tri-State now insists on reading the Bylaws as though "sole discretion" were the relevant standard.

B. Tri-State's denial that its members have a right to a fair and equitable exit suggests arbitrariness and bad faith.

Tri-State identifies "voluntary and open membership" as the first among a purported "core set of principles." (Exhibit 1 to DMEA's May 30, 2018 Policy 316 Complaint.) Tri-State's interpretation of the Bylaws in its Decision, however, raises questions about that commitment. Indeed, Tri-State's Decision seems to suggest that whether the Board will offer an exiting member a fair and equitable withdrawal depends on what side of the bed the decisionmakers at Tri-State woke up on. This makes voluntary membership a strikingly weak "core principle," and it calls into question Tri-State's good faith commitment to the Bylaws and the other supposed "core principles."

Tri-State claims Kit Carson obtained a "fair and equitable exit." Yet Tri-State takes the position that a future cooperative need not get a fair and equitable exit. Tri-State could even claim to be providing a member with fair and equitable terms while in fact subjecting them to inequitable ones. Without transparency, how can the cooperatives know? What criteria does Tri-State employ to decide which member-owners get fair and equitable terms, and which member-owners get unfair and inequitable ones? Tri-State's Decision embraces a type of discriminatory and unfair arbitrariness that would invite critical scrutiny from a jury or regulator.

It's also unclear how Tri-State's "we could be fair, but maybe not" approach to exiting members fits with the Board's commitment to the mark-to-market exit methodology (*see* Decision at 4). One might suppose that Tri-State's adopted methodology is meant to be a fair and objective method of calculating a buyout amount. Tri-State's Decision calls this into question. Does Tri-State sometimes use a mark-to-market approach that's fair and equitable, but sometimes not? Was Tri-State's [redacted] exit number for DMEA the result of a fair and equitable application of mark-to-market, or an arbitrary application of mark-to-market that Tri-State staff set in its "sole discretion"? And how can DMEA verify this when Tri-State withholds the relevant information?

Of course, one way to verify fairness is to share information about underlying modeling for both DMEA and Kit Carson. But Tri-State refuses to do that.

C. Tri-State's "we could be fair, but maybe not" approach to member exit violates public policy and harms both DMEA and its retail distribution members.

In its July 25 position statement, DMEA explained that it has spent time and effort assessing how it can best serve its retail member-owners given Tri-State's high wholesale rates. Based on the exit terms Tri-State gave Kit Carson (which had the same 2040 wholesale power contract as DMEA), DMEA believes it can exit Tri-State on fair and equitable terms that will benefit DMEA's retail members in the long term. (*See* Attachment A at Question 5.)

Tri-State's questionable commitment to fairness and equity—and its explicit embrace of a "we could be fair, but maybe not" approach to membership exit—suggest that Tri-State treats these Bylaw provisions like illusory contract wherein it completely dictates the terms. DMEA's ability to exit Tri-State and provide its retail members with lower-cost power alternatives can be jeopardized by Tri-

State's demand for an exorbitant and unfeasible buyout price. Set a buyout price for an unfairly high amount—say, [redacted]—and most members can never exit.

Ultimately those hurt by Tri-State's approach are not the distribution cooperatives, but the retail customers—*i.e.*, members of the public—who are deprived of a less costly and more efficient alternative power option because their distribution cooperative cannot withdraw from Tri-State on fair and equitable terms. The position Tri-State takes in its Decision is thus detrimental to the public good.

IV. TRI-STATE CANNOT DIRECT STAFF TO NEGOTIATE A DMEA MEMBERSHIP WITHDRAWAL WHILE KEEPING THE DMEA/TRI-STATE WHOLESALE ELECTRIC SERVICE CONTRACT IN PLACE.

Tri-State contends that DMEA can withdraw from membership *and* continue to perform under its 2040 wholesale electric contract. Tri-State directs staff to negotiate "equitable terms" for DMEA membership withdrawal while keeping DMEA's current electric wholesale power contract in place until 2040. (Decision at 8.) This would "avoid any reallocation of the financial risk to which [DMEA and the remaining members] agreed when the [2040] contract was signed." (*Id.*) DMEA objects to this for several reasons.

First, Tri-State's approach violates the Bylaws because membership is intertwined with a member's wholesale electric contract. Withdrawal under Bylaw Section 3(a) is temporally restricted, meaning that it is prohibited (the language of the Bylaw is mandatory) until after a member has fulfilled its contractual obligations to Tri-State. Read as a whole, the Bylaw requires Tri-State to allow a member to exit on terms that provide for a fair and equitable termination of any wholesale electric supply contract, otherwise the withdrawal rights under the Bylaw are illusory.

Moreover, Tri-State's approach to membership withdrawal while remaining in the wholesale contract would have DMEA giving up the benefits of membership for nothing in exchange. That's neither fair nor "equitable." Nor is it what Tri-State did with Kit Carson. Withdrawal on equitable terms inherently includes an equitable or fair termination of the parties' wholesale electric contract.

DMEA's argument on this point is strengthened by the fact that Tri-State has applied the Bylaw in this fashion to prior withdrawals, including to the Chimney Rock coops and Kit Carson. Indeed, Tri-State has even approached DMEA's withdrawal in this fashion, but simply has refused to provide terms that are equitable.

Finally, the arguments Tri-State advances in its Decision undermine the assertion that meeting contractual obligations to Tri-State requires purchasing power from it through 2040. Toward the beginning of its Decision, Tri-State identifies specific obligations for which DMEA is responsible. (Decision at 2.) Those obligations relate to debt used to build assets that serve DMEA. (*Id.*) Tri-State thus highlights the dramatic gap between money raised in the mark-to-market methodology and money necessary to satisfy DMEA's obligations under the wholesale electric supply contract.

CONCLUSION

For the reasons stated above, DMEA requests that Tri-State change its position and adopt the proposed findings and directives from DMEA's July 25 position statement.

Dated: September 21, 2018

Jasen Bronec, Chief Executive Officer
Delta-Montrose Electric Association

/ Attachment

ATTACHMENT A

DMEA's JULY 25, 2018 POSITION STATEMENT AND PROPOSED FINDINGS AND DIRECTIVES

DMEA
A Touchstone Energy® Cooperative

Non-Confidential

VIA U.S. MAIL AND EMAIL

July 25, 2018

Board of Directors
Tri-State Generation and Transmission Association, Inc.
1100 W 116th Ave
Westminster, CO 80234

Re: Delta-Montrose Electric Association (DMEA) Policy 316 Statement of Position

Dear Tri-State Board of Directors:

Here is a copy of DMEA's Statement of Position for the Policy 316 complaint that you will be considering during Tri-State's August board meeting.[1] We know that Tri-State directors have many documents to read before every meeting, so we tried keeping it short and direct.

Tri-State management wants you to reject DMEA's Policy 316 complaint because of the difficult questions it raises, and because of the difficult truths to which it might lead. But doing that would mean letting management continue withholding information about DMEA and about Kit Carson from you as Tri-State Board members and from the member-owners of Tri-State. Accepting management's arguments on their face means never having to meaningfully consider the core issue in DMEA's Policy 316 complaint: Is management's DMEA buyout number fair and equitable under Tri-State's bylaws?

Kit Carson exited for $37 million. DMEA's buyout number is [redacted]. That's [redacted] times larger. Yet none of the mark-to-market factors that Tri-State uses in buyout calculations explains this difference: DMEA is not [redacted] larger than Kit Carson. The price of power on the market hasn't changed by [redacted]. Tri-State's power prices haven't changed by [redacted]. How can the same methodology result in such a dramatic discrepancy? This inexplicable difference is why DMEA has requested the Kit Carson transaction data and all of Tri-State's underlying modeling for DMEA.

What is Tri-State management's answer? Reject DMEA's Policy 316 complaint. Don't worry that many of DMEA's points haven't been addressed. And don't consider that maybe DMEA is right.

- If you think it's right for management to withhold information from the Tri-State Board and from Tri-State's member-owners, then vote against DMEA's request.
- If management asserting that the Kit Carson information is "not relevant" is enough for you, and you don't trust member-owners to decide that for themselves, then vote against DMEA's request.
- If you don't think that Tri-State directors have a fiduciary duty to understand whether in retrospect the Kit Carson exit was fair to all members, then vote against DMEA's request.
- If you have no problem with Tri-State setting exit terms that mean it collects billions more from its members than it has in long-term obligations, then vote against DMEA's request.

[1] Kyle Martinez, who serves as a director for DMEA and Tri-State, had no role in drafting the Statement of Position.

- If you think that Tri-State management—not the members—owns the cooperative, then vote against DMEA's request.
- If you don't think Tri-State has an obligation under the Tri-State Bylaws to let a member withdraw under fair and equitable terms, then vote against DMEA's request.

The other option is to vote in favor of DMEA's Policy 316 complaint.

- If you believe transparency, consistency in governance, and fairness to all members should be hallmarks of a cooperative association like Tri-State, then vote for DMEA's request.
- If you believe that management should not withhold important member exit information from the Board and from member-owners, then vote for DMEA's request.
- If you believe each cooperative can decide independently for itself and can think independently for itself about the significance of important information, then vote for DMEA's request.
- If you believe the Tri-State board and member-owners should be able to independently verify if Kit Carson's exit was "fair and equitable" to all members, then vote for DMEA's request.
- If you agree with United Power's June 29, 2018 letter that withholding the requested information puts Tri-State "in the position of bargaining in bad faith," then vote for DMEA's request.
- If you believe voluntary membership in Tri-State is a core principle that matters, then vote for DMEA's request.
- If you believe a contract means something, and that Tri-State management should stand behind the Tri-State bylaws' promise of voluntary membership, then vote for DMEA's request.
- If you believe DMEA, like any other Tri-State cooperative, has the right to fair and equitable withdrawal terms, then vote for DMEA's request.

The Policy 316 dispute mechanism exists to give the Tri-State Board an opportunity to correct Tri-State management's errors. This is one of those errors. Tri-State's Board should direct management to share the information to negotiate an equitable exit with DMEA in good faith.

Voting in favor of DMEA's Policy 316 complaint would further the ideals of transparency and consistency in governance that we believe should be hallmarks of a cooperative association like Tri-State. We hope that you agree.

Please do not hesitate to contact me by email (jasen.bronec@dmea.com) or by cell phone (406-229-0233) if you have any questions.

Sincerely,

Jasen Bronec, Chief Executive Officer

/ Enclosures

DMEA
A Touchstone Energy® Cooperative

DMEA'S POLICY 316 COMPLAINT
POSITION STATEMENT + PROPOSED FINDINGS AND DIRECTIVES

I. BACKGROUND

1. What is this Position Statement?
Tri-State directed DMEA to prepare written Position Statements following its Policy 316 complaint presentation at July's Tri-State board meeting.

2. What's in this Position Statement?
It summarizes key points DMEA made in its July presentation. It also gives the Tri-State Board proposed findings and directives to use in deciding DMEA's Policy 316 complaint.

3. What does DMEA want?
As detailed in the "Proposed Findings and Directives" section at the end, DMEA asks the Tri-State Board to direct Tri-State management to:

- *First*, disclose the information DMEA has requested about the exit calculations for DMEA and for Kit Carson, and
- *Second*, engage in good-faith negotiations with DMEA on exit terms that are fair and consistent with the 2016 exit terms Kit Carson received.

4. Why did DMEA file this Policy 316 complaint?
Two reasons: Fairness and transparency. These principles are critical to every Tri-State member and indeed to the existence of a cooperative like Tri-State. This Board has a fiduciary duty to ensure Tri-State management follows these principles.

5. Why is DMEA exiting Tri-State?
DMEA has spent time and effort assessing how it can best serve its retail member-owners given Tri-State's high wholesale rates. Based on the exit terms Tri-State gave Kit Carson (which had the same 2040 wholesale power contract as DMEA), DMEA believes it can exit Tri-State on fair and equitable terms that will benefit DMEA's members in the long term.

6. Contracts are promises between parties. By exiting, isn't DMEA failing to honor its contractual promise to buy power from Tri-State until 2040?
Tri-State CEO Mike McInnes said this at July's Tri-State board meeting when he claimed DMEA is trying to "renege" on its promises to Tri-State. Seems persuasive, doesn't it?

But he's wrong. There's a more basic contract between Tri-State and DMEA: the Tri-State bylaws. In those bylaws, Tri-State made a contractual *promise* to DMEA that membership was voluntary and that DMEA could exit on equitable (fair) terms. In refusing to provide

fair terms, Tri-State management is "reneging" on its promise to honor the fundamental contractual obligation between Tri-State and DMEA.

In 2016, management tried (but failed) to amend the Tri-State bylaws to remove a member's right to exit on fair and equitable terms. That failed attempt, and management's approach to DMEA's exit, should trouble every Tri-State member. DMEA has the contractual *right* under the bylaws to request this fair exit, and that's all it's doing. Tri-State does not have the right to *deny* a fair exit, but that's what it's doing.

II. SUMMARY OF POSITION

REQUEST 1: Tri-State should be transparent in how it calculated DMEA's exit number.

7. DMEA says it wants more information about how management calculated DMEA's very high exit price; hasn't Tri-State already given DMEA everything?

No. DMEA has not seen the withdrawal calculation spreadsheet (with the assumptions, data, inputs, and formulas) that DMEA can analyze and understand. Without access to this spreadsheet, DMEA and this Board can only speculate as to how management calculated the variables in DMEA's exit number.

It's as if Tri-State has said "x + y – z = DMEA's exit price," but won't show how it calculated x, y, or z. DMEA simply wants to understand how all the variables were calculated.

8. Is it true that Tri-State can't share some exit modeling information because Tri-State uses an expensive modeling program called "UI Planner" that DMEA can't access?

Member-owners like DMEA pay for UI Planner; why deny them access? In any event, Tri-State should share the DMEA-specific UI Planner inputs, as well as the outputs, and show how they fit into the larger exit calculation spreadsheet/formula.

REQUEST 2: Tri-State should be transparent in how it calculated Kit Carson's exit.

9. Why is DMEA requesting Kit Carson's exit information?

This question is at the heart of DMEA's Policy 316 complaint: Is Tri-State's exit number for DMEA fair and equitable as required by Tri-State bylaws? Tri-State gave Kit Carson a $37 million exit number, but says DMEA must pay [redacted]. *Why is DMEA's exit number* [redacted] *that of Kit Carson's, particularly when both have the same 2040 contract?*

There are three major factors in Tri-State's "mark-to-market" exit methodology: the size of an exiting member's load, future market power prices, and Tri-State's rates. DMEA is

not [redacted] larger than Kit Carson. Market power prices have not changed by [redacted]. Tri-State pricing has not changed by [redacted].

Tri-State management says the 2016 Kit Carson exit was a fair and equitable buyout, and that it appropriately addressed the risk to the remaining members. Based on the information available to DMEA, it is impossible to reconcile the DMEA and Kit Carson numbers. Tri-State's refusal to give DMEA exit terms consistent with those of Kit Carson suggests that DMEA is not getting an equitable buyout number. By requesting Kit Carson's exit information, DMEA wants to understand the discrepancy.

10. Is Tri-State management right that the Kit Carson exit number is "not relevant"?
No. The mark-to-market methodology Tri-State uses *makes* it relevant. Kit Carson provides a benchmark reference for fair and equitable exit terms. The key exit factors that applied to Kit Carson apply to DMEA. *How* Tri-State projected market conditions, loads, rates, etc., and *how* it incorporated these factors into its Kit Carson exit number, are relevant factors that DMEA and all Tri-State members should know.

Is the Kit Carson information exactly on point in every respect? Of course not. Time has passed, load forecasts are different, etc. But it's still a meaningful reference: A 2016 road map is still relevant for a driver in 2018, after all, even if the map is two years old.

11. How can you compare DMEA and Kit Carson when they entered Tri-State in different circumstances and when Tri-State has invested different amounts in them?
Wheat Belt Public Power District raised these points in a June 26, 2018 letter. The argument is flawed because none of the factors in that letter have a meaningful effect on the mark-to-market methodology that Tri-State applies when members seek exit. Why should the request for Kit Carson-related information be denied because of differences that aren't relevant to Tri-State's own chosen exit formula?

12. What if DMEA is wrong, and the Kit Carson exit information isn't relevant?
Why not be transparent about those differences, and let the member-owners see for themselves? Why hide information that, once revealed, management says would show member-owners why it makes sense to treat one member differently from another? Doing so would further the ideals of transparency and consistency in governance that we believe should be hallmarks of a cooperative association like Tri-State.

13. Does Board Policy 406 allow Tri-State to disclose Kit Carson's information?
Yes. Tri-State management incorrectly calls the information "restricted." First, Board Policy 406(C)(1)(f) allows disclosure because Kit Carson gave written consent. Tri-State management shouldn't hide behind confidentiality when Kit Carson has waived it.

Second, information and modeling shared between Kit Carson and Tri-State are not attorney-client privileged under Policy 406(C)(1)(e). Third, Policy 406(1)(C)(1)(g) only applies to information as to which Tri-State has a legal obligation to refuse disclosure, such as information belonging to a third party subject to a confidentiality agreement; management should justify concealing the information when Kit Carson has consented.

14. Would disclosing Kit Carson's information disadvantage other Tri-State members?
No. In fact the opposite: When Kit Carson exited, Tri-State said in a press release that the exit was "fair and equitable, and protects the interest of all the association's members." If the Kit Carson exit was equitable to Tri-State and all its members, how are any other members disadvantaged if Tri-State treats another exiting member on the same terms?

15. How can Tri-State Board members and owners know whether the Kit Carson exit terms were fair and equitable unless there's transparency? Should the Board accept management's apparent position that secret modeling can explain the difference?
Good questions. Tri-State's 2017 *Form 10-K* filed with the Securities and Exchange Commission disclosed that if Tri-State underestimates "the monetary value of a Member's obligation . . . our ability to satisfy our financial obligations could be adversely affected." If the Board-approved method is accurate, why issue a disclaimer? And if Kit Carson's exit was equitable to Tri-State and all of its members, as management claims, then all members should be able to evaluate that for themselves. Why disclose that risk in an SEC filing but then conceal information from Tri-State's Board and from its member-owners that would let them make that determination?

REQUEST 3: Tri-State management should negotiate an equitable withdrawal for DMEA.

16. What does it mean when DMEA says it's requesting an equitable buyout number consistent with Kit Carson's exit?
DMEA asks this Board to direct Tri-State management to negotiate DMEA's exit on fair and equitable terms, as required by the Tri-State bylaws, and consistent with Kit Carson.

In the eighteen months since DMEA first requested an exit calculation, management has not negotiated in good faith and has refused to be fair and transparent with a member-owner. It gave DMEA an exit number [redacted] more than the exit number Kit Carson received for the same 2040 contract. DMEA is not [redacted] than Kit Carson, and none of the other mark-to-market inputs changed by [redacted]. Management claims it has modeling information for DMEA and Kit Carson that support this discrepancy, but won't provide it. This lack of transparency suggests an approach to DMEA—and by extension all of you—as outside third parties rather than as members and owners.

17. DMEA keeps saying the Tri-State bylaws require "fair and equitable" exit terms, but doesn't Article I, Section 3 of the bylaws just say "equitable"?

"Equitable" means fair. And DMEA isn't the first to describe the bylaws as requiring "fair and equitable" exit terms: Tri-State itself said during the Kit Carson exit that the bylaws provide for a "*fair and equitable*" exit. (Tri-State June 27, 2016 press release.)

18. But what about Tri-State management's claim that DMEA's high exit number is justified by the risk to other members from DMEA's withdrawal?

This argument doesn't fit with Kit Carson's exit, and suggests that Tri-State management is not following the required mark-to-market exit methodology for either Kit Carson or DMEA. If Kit Carson's $37 million exit number was equitable and covered other members' risk, as management claims (while withholding the relevant information it says supports that), then DMEA's [redacted] number is inequitable. If DMEA's [redacted] exit number is necessary to cover the risk to Tri-State's remaining members, Kit Carson's exit unfairly left the remaining members with millions of dollars in risk. Either way, management's actions—including what they represented to the Board during Kit Carson's exit, and what they're representing now—are deeply troubling.

19. What about Mike McInnes's comment that DMEA could just withdraw from membership and continue to buy power from Tri-State under the 2040 contract?

This would have DMEA give up the benefits of membership for nothing in exchange. That's not "fair and equitable." Nor is it what Tri-State did with Kit Carson.

REQUEST 4: Consider the broader issues raised by DMEA's request.

20. Is your Tri-State membership really voluntary?

Tri-State says voluntary membership is a "core principle" of the company. In 2016, however, management tried to amend the bylaws and take away the promise made to all members of a fair and equitable voluntary withdrawal. That failed. Management's alternative approach—setting an exorbitant exit price and refusing to provide justification—seems intended to have the same effect.

21. Who owns Tri-State: the members, or Tri-State management?

Article VI of Tri-State's Articles of Incorporation say that Tri-State shall be operated on a cooperative, non-profit basis for the mutual *benefit of its members.*" Tri-State's *2018 Investor Presentation* states that it "follow[s] the cooperative business model," and says the association "is member-owned and member governed." Are those documents consistent with Tri-State's actions here? Who benefits when members are kept in the dark about the specific terms of a member's exit? Who benefits when management keeps secrets from the Tri-State Board and the member-owners? How is management treating

the Board and member systems like outside third parties consistent with the principles of member ownership and member governance?

22. Should your distribution cooperative know its buyout number?
The cost of power is your cooperative's largest expense. Everyone on the Tri-State Board of Directors is also director of a local distribution cooperative. Understanding what happened with Kit Carson helps you meet your fiduciary responsibility to your local cooperative. You should know how your cost of purchasing power through Tri-State compares to alternative suppliers. If you don't know how the Kit Carson number was determined and what your coop's exit number would be, how can you fulfill your responsibility to the members of your local cooperative to ensure that Tri-State is delivering an appropriately cost-effective power supply?

23. As a Tri-State director, shouldn't you know the details about Kit Carson's exit?
If you are concerned about the sustainability of Tri-State and your fiduciary duties to Tri-State, it is in your interest as a Tri-State director to know the likelihood that other coops will exit Tri-State, and the related financial impact to the G&T.

24. What does DMEA's [redacted] exit number mean for other Tri-State members?
It should be troubling. If you take the [redacted] exit number that Tri-State has given to DMEA and proportion it out to all cooperatives, it would total more than [redacted] This is more than [redacted] the amount of Tri-State's long-term debt. Why does Tri-State need DMEA—or any member—to pay a number that would result in that kind of windfall for Tri-State? By contrast, it appears Kit Carson's exit price was roughly equal to its proportionate share of long-term debt.

25. Have other cooperatives expressed support for DMEA's Policy 316 complaint?
Yes. United Power, San Isabel, and La Plata have sent letters supporting DMEA. They are enclosed with this Statement of Position.

III. PROPOSED FINDINGS AND DIRECTIVES

DMEA requests that the Tri-State Board adopt the following findings and directives in response to DMEA's Policy 316 complaint:

Findings

A. The information requested by DMEA in its Formal Board Policy 316 Complaint is relevant to DMEA's request to withdraw from Tri-State.

B. There is no basis under Board Policy 406 for refusing to disclose this relevant information to DMEA.

C. Based on the available information, the Board is unable to reconcile Kit Carson's $37 million exit number and the [redacted] exit number proposed to DMEA.

Directives

D. The Tri-State Board directs management to disclose the following information:

1) All information requested in DMEA's May 17, 2017 Policy 406 information request to Tri-State regarding information and a detailed spreadsheet/model used to calculate DMEA's exit number;

2) The information requested in DMEA's April 24, 2018 Policy 406 information request regarding Kit Carson, including the model and inputs used to calculate Kit Carson's exit number; and

3) Such other information that will allow DMEA to make a side-by-side comparison of the assumptions, inputs, and modeling underlying the Kit Carson and DMEA exit numbers.

E. The Board directs management to negotiate equitable exit terms with DMEA that are consistent with (and can be reconciled with) Kit Carson's exit.

June 29, 2018

Mr. Rick Gordon
Tri-State Generation and Transmission
1100 West 116th Avenue
Westminster, CO 80233

Re: Delta Montrose Electric Association, Inc. ("DMEA") Formal Complaint

Dear Mr. Gordon:

The leadership of United Power appreciates the opportunity to comment on the above referenced complaint by DMEA.

United Power does not wish to be a party to the proceedings surrounding the DMEA complaint, but offers the following comments in the interest of fairness between the members of Tri-State Generation and Transmission Association, and transparency and consistency in the governance of the Association.

United Power ("UP"), then known as Union Rural Electric Association, is one of the founding members of Tri-State Generation and Transmission Association ("TS"). As a founding member, and a proud cooperative ourselves, we are highly interested in maintaining the foundational principals of the cooperative relationship; in particular, the equitable treatment of ALL members. We believe that this is not only a requirement of the TS bylaws, but also a standard of the cooperative form of governance in general. The history of cooperatives is rife with case law where the courts have enforced members' rights to be treated equally and fairly.

UP strongly believes that DMEA should be permitted access to the information they have requested regarding the calculation of their buy-out number from TS. Without that information, how can DMEA (or any other member or entity, such as the TS Board) determine that the amount quoted is equitable? DMEA is much more than a customer of TS; they are an owner of the Association and, as such, should be entitled to a higher level of access to information necessary to conduct business and make sound decisions. The continued withholding of that information puts TS in the position of bargaining in bad faith.

Tri-State Generation and Transmission
June 29, 2018

The TS bylaws, Article I, Section 3.a., allow for the withdrawal of a member "upon compliance with such equitable terms and conditions" as prescribed by the TS Board. Inherently, the clause requires that the withdrawal terms be equitable not only to the withdrawing member, but to the remaining members as well. The complete lack of transparency by TS surrounding not only the DMEA withdrawal, but also the Kit Carson withdrawal makes it impossible to determine the level of equity among the members for these two transactions.

The Objective paragraph of Policy 316 states that the intent of the policy is to provide a full opportunity for a member to present its case on any issue to the TS Board. Step 2 (paragraph eight) of that policy provides for a process that promotes "the full exchange of ideas and opinions…". UP has serious doubts that the 40 minutes allowed for DMEA (as outlined in the June 15, 2018 letter from Mr. Gordon) to present its case to the TS Board will be an adequate amount of time to meet the "full exchange" standard established in the policy. It is our understanding that the DMEA complaint is the first instance of the use of Policy 316, or at least the first instance that has gone as far as formal consideration by the TS board. The process adopted will set precedent for the future application of the policy and, therefore, UP is interested in ensuring that the process is one that allows for a true and adequate exchange of ideas and opinions among the membership.

The complaint by DMEA raises issues that are very specific to its situation, but are also very important to the entire membership. There are positions being taken by TS that seem to conflict with the cooperative principle of voluntary and OPEN membership (emphasis added). Does TS view itself as a corporate entity, completely separate and distinct from its members? According to Tri-State's Cooperative Business Model page of their website, Tri-State is an Association made up of members and with no purpose other than to supply the power needs of those members and their consumers. Tri-State professes to "work tirelessly to engage our members and ensure we meet their wholesale power needs and provide the services THEY VALUE." The fact that DMEA cannot get the information it seeks on its buyout numbers indicates that TS does not really subscribe to the idea of OPEN membership.

Tri-State's Policy 406 section D states that "If a request submitted by a Member System involves or pertains to Restricted Information of or pertaining to one or more other Member Systems, such information shall not be disclosed except upon Tri-State's receipt for written authorization from all Member Systems involved." Mike McInnes' letter of May 8, 2018 appears to be in direct violation of this policy because Kit Carson has consented to the disclosure of their buy-out calculation to DMEA. Based on that consent, UP believes that DMEA is entitled to receive the confidential information provided during the course of negotiations with Kit Carson's withdrawal from TS membership upon execution of a valid non-disclosure agreement.

We respectfully request the TS Board positively consider the request for information by DMEA.

Tri-State Generation & Transmission
June 29, 2018

James Vigesaa, President

Susan Petrocco, Vice-President

Elizabeth Martin, Secretary

Ursula Morgan, Treasurer

Keith Alquist II

Ginny Buczek

Tim Erickson

Brian McCormick

Rick Newman

Dave Rose

Tamra Waltemath

John Parker, Chief Executive Officer

San Isabel
Electric Association, Inc.
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July 6, 2018

Mr. Rick Gordon
Tri-State Generation and Transmission
11 West 116th Avenue
Westminster, CO 80233

Re: Delta Montrose Electric Association, Inc. (DMEA) Formal Complaint

Dear Mr. Gordon:

The Board of Directors of San Isabel Electric Association supports DMEA's request for information regarding the Kit Carson buyout. We believe every member of Tri-State should have transparency into the transactions that could have an impact on our equity/ownership position. Every member of Tri-State should have a clear understanding of the methodology that would be used if they no longer desired to be a member-owner of Tri-State.

The electric utility industry is becoming more competitive. As distributed energy resources drop in price, our consumers are being courted by vendors that have identified opportunities to exploit our cooperative business model. The two weaknesses we must address are: the high costs of serving rural areas and purchased power costs. At San Isabel Electric we've held controllable costs flat for the past ten years. This required a drastic shift in strategy that included a reduction of our workforce by more than twenty five percent.

What is Tri-State's strategy for the future? As a member-owner of Tri-State, San Isabel Electric doesn't know because strategic planning is conducted in executive session. This lack of transparency does nothing to create a feeling of ownership, on the contrary we feel like we are no more than a customer.

The member-owners cannot make good business decisions when we don't have information. Being bound to a long-term power supply used to be an asset, but today is a liability. Recent rate stability from Tri-State has been a welcomed reprieve but is not enough. What dramatic steps will be taken to become a more competitive power supplier for the member-owners?

The member-owners of Tri-State have the right to know what Tri-State's detailed strategy is, and we have the right to know what the formula for getting out of Tri-State will be, so business decisions can be made. Maybe every member of Tri-State doesn't feel the competitive pressures, but every member of Tri-State should be working to bring as much value to the end-use consumers as possible.

We strongly urge the Tri-State Board of Directors to honor the request of DMEA. If Kit Carson wasn't given a "sweet heart" deal, then let the rest of the membership know that. Additionally, if Tri-State feels they are offering a competitive solution for the member-owners then become more transparent with the buy-out methodology and the strategic plan. San Isabel Electric's Board of Directors see a growing division between Tri-State and many member-owners, including us! That's not a sustainable cooperative model.

Deborah Rose, President

Jacque Sikes, Vice President

Dennis Maroney, Secretary

Doris Morgan, Treasurer

Edward Garcia

Joseph Costa

cc: Tri-State Member Managers

LPEA
La Plata Electric Association, Inc.
A Touchstone Energy® Cooperative

P.O. Box 2750 Durango, CO 81302-2750
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June 29, 2018

Michael McInnes, Chief Executive Officer
Tri-State Generation & Transmission Association, Inc.
1100 West 116th Ave.
Westminster, CO 80234

Jasen Bronec, Chief Executive Officer
Delta-Montrose Electric Association
Po Box 910
Montrose, CO 81401

Re: LPEA Handout for DMEA TS BOD Policy 316 Complaint hearing

Dear Mike and Jasen:

LPEA submits this letter which contains the comments I will make at the DMEA Policy 316 Complaint hearing:

1. Tri-State Articles, (Article VI, Organizational Structure, states in part "This Corporation is formed without any purpose of direct gain or profit to itself, and it shall be operated on a cooperative, non-profit basis for the mutual benefit of its members"), and Tri-State bylaws, (Article I, Membership, Section 3 Withdrawal…, subsection (a) starts in part "A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation") are both contractual obligations between Tri-State and its member cooperatives to provide services and charge for those services in mutually beneficial ways to the members, and in the case of withdrawal of members, to ensure equitable treatment of all its members. Those duties and obligations cannot be fulfilled without transparency of the details of the exit of one of Tri-State's members, Kit Carson, and the process by which Tri-State is calculating the proposed exit of another member, DMEA. Equitable is not a term reserved for one party to a contract. Determining equitable treatment is where the facts are known sufficiently for all parties to so declare the terms as equitable.
2. Tri-State's degree of success is wholly contingent upon the cooperation and commitment of its distribution member cooperatives with one another and Tri-State. We would agree a key tenant of that process is disclosure of information. Tri-State should disclose its methods for calculating Kit Carson's and DMEA's buyout numbers.

Comments respectfully submitted.

Sincerely,

Michael A. Dreyspring
CEO

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
HEADQUARTERS: P.O. BOX 33695 DENVER, COLORADO 80233-0695 303-452-6111

November 14, 2018

Via Electronic Mail (jasen.bronec@dmea.com)

Mr. Jasen Bronec
Chief Executive Officer
Delta-Montrose Electric Association
P.O. Box 910
Montrose, Colorado 81402-0910

Dear Jasen:

In light of the Board's denial of DMEA's Board Policy 316 appeal, I am writing to comply with the Board's instructions to Tri-State staff.

In its August 23, 2018 decision, the Board noted that DMEA can withdraw as a Tri-State member while continuing to honor its wholesale electric purchase contract. The Board therefore directed its staff to negotiate equitable terms and conditions for DMEA to withdraw from Tri-State, while continuing to honor all of its contractual obligations to Tri-State. The Board also directed staff to consider recommending withdrawal terms that include a buyout of DMEA's contract, so long as the assumptions underlying any such buyout are equitable while resolving all reasonable doubts in a manner designed to protect the financial interests of remaining Tri-State members.

As we discussed on the phone, my staff and I are prepared to meet with you to discuss equitable terms and conditions under which DMEA might withdraw from membership in Tri-State. We are prepared to discuss withdrawal terms with and without a contract buyout. Please give me a call so that we can find a mutually convenient time for our discussions.

Sincerely,

Micheal S. McInnes

Micheal S. McInnes
Chief Executive Officer

MSM/db